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No.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

UNITED STATES OF AMERICA,

Respondent,

-v.-

KENNETH THOMAS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. Whether the evidence was insufficient to establish that appellant was guilty of the conspiracy charge.

2. Whether the district court erred in denying appellant's severance motions.

3. Whether the district court erred in denying appellant's motion to strike the agents' testimony that they saw appellant engage in what "appeared to be drug transactions".

4. Whether the district court erred in refusing to instruct the jury that his charge on aiding and abetting was not applicable to the conspiracy charge.

5. Whether the district court erred in allowing the government to introduce into evidence the testimony that when appellant was arrested, he was in possession of a small vial and some cellophane envelopes, some of which contained a residue

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Kenneth Thomas respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported; a copy is annexed as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1983.

The Court's jurisdiction is invoked pursuant to Title 28, United States Code, §1254(1).

STATEMENT OF THE CASE

Appellant Kenneth Thomas was indicted on October 13, 1981 along with eighteen other defendants in a fifteen count indictment charging various violations of the federal narcotics laws.[1] Thomas was named only in Count One, which charged all nineteen defendants with conspiracy. He was named in only one of the thirty-two overt acts listed by the government in that count (Overt Act #31). The remaining fourteen counts charged various of appellant's co-defendants with substantive narcotics offenses.

The government proceeded to trial against appellant Thomas and three of his co-defendants — Yvette Carson, Lemuel Mont and Gay Burnetta Galloway.[2] The trial lasted over three weeks and involved twenty-four witnesses, one pound of drug evidence and several dozen documents and other exhibits. The government conceded at trial that the evidence it was presenting was an amalgamation of three separate Drug Enforcement Administration ("DEA") investigations (T. 299, et seq.).[3] Most of that

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1/ The indictment is set forth in appellants' Joint Appendix at A 010.

2/ The remaining fifteen defendants either entered guilty pleas or could not be brought to trial because they had not been apprehended.

3/ References preceded by "T" are to pages of the trial transcript; references preceded by "A" are to appellants' Joint Appendix in the United States Court of Appeals for the Second Circuit.

evidence had nothing to do with appellant Thomas; in fact, only two of the witnesses made any mention of him in their testimony. All the rest of the evidence in this lengthy trial concerned the three co-defendants on trial or the fifteen other defendants not on trial.

A. The Evidence Pertaining to Other Crimes Committed by Other Defendants

According to the government's witnesses, the first investigation relevant to this case began in June, 1980. On the ninth of that month, DEA Agent Coleman, acting in an undercover capacity, purchased one and one-half ounces of heroin from Anthony and Phillip Pegues and a third, unidentified individual for $1,000 (T. 32-33). Counsel for appellant Thomas objected to this evidence on the ground that none of the participants in this transaction had anything to do with appellant Thomas (T. 33). The court took the evidence "subject to a motion to strike" in the event that it was never connected to appellant Thomas (T. 33-34).

On June 20, 1980, Agent Coleman phoned Anthony Pegues and told him that she was interested in purchasing better heroin, and in larger quantities (T. 569). Pursuant to that conversation, Coleman met Anthony Pegues on June 23, 1980 and was introduced to Guy Wilkins, whom Pegues identified as his source (T. 568-569). Coleman then discussed with Wilkins the possibility of buying larger amounts of heroin, which Wilkins said

he could supply. The conversations ended with Coleman telling Wilkins that she would get back to him. The following morning, Coleman again phoned Anthony Pegues and told him that she wanted to buy a "spoon" (one-quarter ounce) of heroin. That conversation had been recorded and was played to the jury, again over appellant Thomas' objection that it was irrelevant and prejudicial as to him (T. 577). Pursuant to that conversation, Coleman met with Anthony Pegues and Guy Wilkins that afternoon and purchased one-quarter ounce of heroin from them for $2,700 (T. 583). According to Coleman, Wilkins used a child to deliver the drugs (T. 582-583). The drugs from this transaction were introduced into evidence, again over Thomas' objection that they had nothing to do with him (T. 46-47).[4]

After further discussions, Coleman and DEA Agent Baker met with Guy Wilkins, his brother Michael Wilkins (a/k/a Michael Green) and Shawn Lovett on July 1, 1980 and purchased one-half ounce of heroin from them for $10,000 (T. 49-58). Again, the agents emphasized that children, one of them a "pre-teen", were used to deliver the drugs (T. 54-55). Moreover, Agent Baker quoted Wilkins as saying that his operation was a "family business", a reference to the fact that he was working with his brother (T. 54). The drugs from this transaction were likewise

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4/ The trial court ruled at this point that any objection made by any defense counsel would apply to all defendants unless the court stated otherwise.

introduced into evidence, with the court giving appellant Thomas' counsel a "continuing reserved motion to strike" if the evidence was never connected to his client (T. 59).

On July 17, 1980, Agents Coleman and Baker had a conversation with Guy Wilkins concerning further, larger purchases of heroin, during which Wilkins said that he had several Italian sources, including one Vinnie Martino (T. 70). The following day, Wilkins sold the agents one ounce of heroin for $13,500, saying that this heroin, as well as the heroin he had sold to them on July 1, 1980 had come from the owner of the Our Place Bar (T. 76). The drugs from the July 18 transaction were introduced into evidence (T. 78).

Baker thereafter severed his relations with Wilkins when the latter, during a subsequent conversation, asked to see his driver's license (T. 82).

The agents resumed relations with Wilkins on August 12, 1980, and on August 13, purchased four grams of heroin from him for $2,200 (T. 87-92). This heroin was introduced into evidence, again over appellant Thomas' objection (T. 93).

Baker and Wilkins next had discussions concerning the possibility that Baker would sell quinine to Wilkins and his supplier. Pursuant to these discussions, Baker, on September 9, 1980, gave Wilkins a sample of quinine (T. 95). During this exchange, Wilkins said that his source, the owner of the Our Place Bar, used his sister as a courier between himself and the Italians (T. 97).

On September 12, 1980, the agents first met with Anthony Pegues, who gave them his phone number and told them that he had a new source of supply (T. 99). The agents then met Wilkins and drove around with him while he was distributing his heroin, during which ride the agents discussed the possibility of selling some allegedly stolen liquor to the owner of the Our Place Bar (T. 99-100). When Agent Baker told Wilkins that he was going to Atlanta, Georgia, on vacation, Wilkins gave him the number of an individual named Sam, whom, Wilkins said, Baker would be interested in meeting (T. 101).

In Atlanta, Baker got in touch with Sam, who, it turned out, had only marijuana for sale. At Baker's request, however, Sam got in touch with Wilkins' sister in New York to try to line up a heroin source for them. Sam also suggested that Baker go to "Lam", the owner of the Our Place Bar. Lam was later identified as defendant Lemuel Mont (T. 100-105).

After Baker returned to New York, he and Coleman again met with Wilkins and on September 29, 1980, purchased two ounces of heroin for $20,000 from Wilkins and a person named "Frog" (later identified as Arthur Collins). During this transaction, Wilkins identified his brother David as the source of the heroin being sold (T. 108). That heroin was introduced into evidence (T. 118).

On October 3, 1980, Baker met defendant Mont and sold him fifteen cases of purportedly stolen liquor (T. 106-107, 124-131).

According to Baker, two of the bills Mont used to purchase the liquor were bills which Baker had used to purchase heroin from Wilkins on September 29 (T. 131-132). Those bills were introduced into evidence, again over the objection of appellant Thomas that they were not shown to be relevant to him (T. 132). The list of the serial numbers of the bills used in the September 29 transaction was also received into evidence over the same objection (T. 145).

On October 23, 1980, the agents had a discussion with Wilkins about the possibility of selling him ten pounds of quinine, during which conversation Wilkins indicated that he had a new source of supply. The agents also talked with defendant Mont that day about the possibility of selling him quinine in return for heroin (T. 147-152).

The following day, the agents again met with Wilkins to discuss the possible purchase of one ounce of heroin. During this conversation, Wilkins again mentioned the fact that he had a new source of supply (T. 153). On October 27, 1980, the agents again discussed with Mont the possibility of exchanging heroin for quinine, and the following day Mont bought a one-pound sample of quinine from the agents for $400 (T. 154-156). During this transaction, Mont said that Wilkins sometimes used his name for clout (T. 157).

On October 29, 1980, the agents went to the Our Place Bar and asked Mont for a sample of his heroin. While they were waiting, Wilkins came in and told them that he had gotten the

quinine they had sold to Mont. Wilkins also said that he had severed relations with both Mont and his brother, and reminded them that he had a new source of supply (T. 164-166).

Pursuant to subsequent discussions with Wilkins, the agents on October 31, 1980 purchased a sample of heroin Wilkins had obtained from his new source for $900. This sample was introduced into evidence, over appellant Thomas' continuing objection (T. 170-181).

On November 5, 1980, the agents, in a recorded conversation with Wilkins which was played for the jury, made arrangements to meet Wilkins' new source (T. 184-187). Thereafter, the agents met Wilkins in the vicinity of St. Clare's Hospital. While Baker talked outside with Wilkins' associate, Arthur Collins, about Thai sticks, Agent Coleman went inside the hospital with Wilkins and was introduced to his new supplier, Fred Chaffin (T. 192-194). Thereafter, the agents bought one ounce of heroin from Wilkins and Collins for $14,000 and two pounds of quinine. The heroin was introduced into evidence (T. 194-197).

On December 18, 1980, the agents had a conversation with Chaffin concerning their interest in purchasing five kilograms of heroin. Chaffin said that such a transaction would be no problem (T. 199). On February 23, 1981, the agents also spoke to Wilkins concerning the possibility of such a transaction. Wilkins explained that Chaffin, after some problems,

had re-established himself with the Italians and now had a black partner (T. 202). On May 20, 1981, the agents told Wilkins that they had raised the money to make the purchase (T. 205).

Pursuant to a conversation with Chaffin on May 22, 1981, the latter had Wilkins give the agents a sample of heroin on May 27 (T. 206-212). This sample was introduced into evidence over Thomas' objection (T. 217-219). Chaffin told the agents during this transaction that he had two black partners. When Baker told Chaffin that he wanted to buy into the partnership, Chaffin said that he would check with his partners (T. 215).

On May 28, 1981, Baker waited with Chaffin while Agent Williams was taken by Wilkins and a female to purchase four ounces of heroin for $45,000 (T. 220). On June 23, 1981, the agents paid the remaining $5,000 on this purchase to Chaffin (T. 229). On June 22 and 23, the agents also had discussions with Chaffin concerning the possible purchase of three to four kilograms of heroin, with Chaffin responding that he could get such an amount in fifteen minutes and giving the agents his phone number (T. 224-229). The agents also discussed with Chaffin the possibility of setting up a quinine selling business (T. 229). Pursuant to the latter discussion, the agents gave Chaffin a one-ounce sample of quinine on June 26, 1981 (T. 230).

On July 17, 1981, Baker met with Wilkins, who introduced him to an individual named "Can Do", later identified as Kenneth Nunes. During this discussion, reference was made to

the fact that Nunes' sister was in the drug business. When Wilkins explained to Baker that Chaffin had fallen out of favor with the Italians, Baker offered him $25,000 for an introduction to Chaffin's former partners (T. 230-233).

When Chaffin's former partners refused to meet Baker, the latter offered Wilkins $5,000 to point one of them out to him (T. 237-239). Wilkins then agreed to introduce Baker to that individual in the context of a purchase of one-eighth kilogram of heroin. The first time that they went to the Close Encounters, a club in Mount Vernon, New York, for purposes of this meeting, however, they were met at the door by an individual (later identified as Peter Larkins), who told them that "Freddy" was not coming in that night (T. 240-242). While they were there, however, the agents had a conversation with Wilkins and Larkins concerning the possibility of selling Freddy and his partners some quinine (T. 243-244).

On July 24, 1981, the agents met Wilkins at the same club. This time, Wilkins was accompanied by defendant Yvette Carson. Wilkins introduced several of the agents to Freddy, later identified as Fred Galloway, and then explained that Galloway had sent his daughter, defendant Gay Galloway, to get the heroin. After Ms. Galloway returned to the club, the agents gave $42,000 to Wilkins, who, after going into Galloway's office, returned and delivered one-eighth kilogram of heroin to them. These drugs were introduced into evidence over Thomas' continuing objection (T. 245-258).

On July 28, 1981, Agent Baker met with defendant Carson at a restaurant called the Jack-in-the-Box in the Bronx, and discussed with her the possibility both of purchasing heroin and of becoming her partner and meeting her Italian source. Carson said that she would speak to her source (T. 261-268).

On July 30, 1981, Baker delivered a barrel of quinine to Wilkins for him to sell. The following day, Wilkins told Baker that Carson's Italian source had refused to meet him (T.268-282).

On August 14, 1981, Baker had a conversation with Carson concerning rumors in the street that Baker and his associates were law enforcement officers. On August 20, Baker had a similar conversation with Wilkins (T. 304-320).

On October 4, 1981, agents arrested Fred Galloway. The government introduced into evidence certain items seized from Galloway at the time of his arrest, including business cards in the name of Fred Gonzalez of the Close Encounters Discotheque and a car registration (T. 320-344).

On October 7, 1981, the agents arrested defendant Gay Galloway. At the time of her arrest, Ms. Galloway admitted bringing a package to the Close Encounters on July 24, 1981 (T. 345-351).

The events outlined in the preceding paragraphs were described at trial by Agents Baker (T. 31-560), Coleman (T. 560-785), Hatcher (T. 786-794), Williams (T. 795-968, 1005-1050),

Hayward (T. 1065-1105, 1190-1299), and Foley (T. 1112-1129), as well as numerous other government witnesses. On several occasions, the district court commented on the extent and cumulative nature of the evidence about persons who were not even on trial (see, e.g., T. 621, 691, 708).

B. The Evidence Concerning Appellant's Brother, Howard Thomas

While the events described above were taking place, the DEA was also engaged in a separate, unrelated investigation which commenced on July 21, 1981 when DEA Agents Kenneth Johnson and Dannie West, acting in an undercover capacity, were introduced by a confidential informant to one Howard Thomas (hereinafter "Howard" outside the Star Lounge bar (T. 1160). The agents discussed with Howard the possibility of purchasing one ounce of heroin, Howard replying that he could provide such an amount. Howard also stated that his partner (later identified as Thomas Wilson) had a store on the next block. The agents left but returned at 7:00 p.m. that evening, at which time Howard took them to meet Wilson. Together, they all drove to the Bronx, where Wilson obtained an ounce of heroin and sold it to the agents for $8,500 (T. 1160-1167, 1201-1211). The heroin was introduced into evidence (T. 1211).

On August 6, 1981, the agents met again with Howard and discussed the purchase of another ounce of heroin. That purchase did not take place, however, because Wilson could not arrange it (T. 1255-1260).

On August 10, 1981, the agents again approached Howard about purchasing heroin. After some delay waiting for Wilson, Howard said that he could "turn [the agents] on" to someone else who could sell them the drugs. When Johnson agreed, Howard spoke to someone in a Continental parked down the block and then came back to say that the transaction could be arranged but that the man would have to go somewhere to get the drugs. After Johnson eventually agreed to this, the man in the car drove off. While they were waiting, Howard became concerned that there were police in the area and told the agents to drive around the corner. After waiting there for fifteen minutes, they left. Pursuant to a phone conversation with Howard later that day, however, they returned, at which time Johnson was introduced to the man who was to sell him the drugs. This individual turned out to be Kenneth Nunes. Upon recognizing Johnson, Nunes said that he would first have to call his sister (Yvette Carson) to approve the deal. Howard explained to the agents that Carson was Nunes' "main lady" (T. 1406). After making a call, Nunes said that his sister did not want him to deal with Johnson because the last time Johnson was with her, he had asked too many questions. Consequently, no sale took place (T. 1255-1279).

C. The Evidence Concerning Appellant Thomas

The agents testified that appellant lived in the vicinity of the Star Lounge (T. 1329). When they first spoke to Howard Thomas there on July 21, 1981, appellant Kenneth Thomas was standing on some steps five to ten feet away. According to the agents, he was just standing there, not doing anything. He did not participate in any way in the conversation between Howard and the agents (T. 1163-1164).

When the agents returned later that day, they saw appellant standing in front of the Star Lounge. While they were talking to Howard Thomas in their car, they saw appellant engage in what they characterized as "narcotics transactions" (T. 1168). According to the agents, this consisted of individuals handing money to appellant and appellant handing something to them "in a manner as to hide what was in his hand" (T. 1168). The agents admitted that they could not see what appellant handed to the individuals (T. 1307). Nevertheless, counsel's motion to strike the agents' characterization of this conduct as a narcotics transaction was denied (T. 1659). Agent Johnson testified that when Howard Thomas gave them his phone number, he told them that they could also get in touch with him through his brother or the "individual" (apparently the bartender) in the Star Lounge (T. 1314).

According to Agent West, while they were talking to Howard, appellant came over to the car on one occastion and attempted to give Howard some money, but Howard told him to hold on to it for awhile. West also testified that an unidentified female came over to the car during their discussion and asked Howard if he had "anything". Howard told her to "go down there", pointing down the street. According to West, several people, including appellant, were standing in the direction Howard pointed (T. 1413, 1472). The agent admitted on cross-examination that she did not know which particular person Howard was pointing at (T. 1473). Appellant did not participate in any way in the agents' discussion with Howard Thomas, nor in the transaction between Howard Thomas, Thomas Wilson and the agents which took place later that day (T. 1201-1211).

When the agents came to the Star Lounge looking for Howard Thomas on August 6, 1981, they did not see him, but did see appellant standing out front. Consequently, Johnson asked appellant if he could put them in touch with Howard, saying it was important. Appellant responded that he could, adding that he knew what they wanted because his brother had told him. Appellant then rode around with the agents, attempting to locate his brother for them. They later found him standing in front of the Star Lounge. When Howard came over to the car, however, appellant left. He did not participate in any way in the narcotics discussion that followed (T. 1257-1258).

On August 10, 1981, while the agents were talking to Howard, they again saw appellant in the area and on two occasions witnessed him taking money from someone and giving that person an unidentified object in return (T. 1268, 1399). The agents also testified that while they were there, they observed an unidentified woman come up and speak to Howard and appellant, following which the three of them walked by a car in which a DEA surveillance agent was seated, paused briefly in front of the car, and then continued down the street. Thereafter, the man in the Continental, to whom Howard had spoken earlier, walked over and had a conversation with the surveillance agent. No evidence was introduced as to the nature of that conversation OT. 1268-1269).

The agents testified that they never received any drugs from appellant and never had any discussions with him concerning such a possibility (T. 1477). They also testified that appellant was "not a primary subject" but rather a "very tangential subject of the investigation", and that most of the actions they attributed to him in their testimony were not even mentioned in their reports (T. 1303-1305).

The indictment in this case was filed on October 13, 1981. Howard Thomas and most of the other co-conspirators were arrested prior to that date (T. 1429). Appellant, however, was not arrested until October 19, 1981. Nevertheless, the government was permitted to introduce, over objection from appellant,

proof that when appellant was arrested, he was in possession of a small vial and some cellophane envelopes, some of which contained heroin residue. He was also in possession of a small vial containing residue of cocaine (T. 1415-1438).

Appellant's pre-trial and trial motions for a severance were denied (T. 1758, et seq.), as were his trial and post-trial motions for a dismissal and/or a directed verdict based on the failure to sever and the insufficiency of the evidence (T. 1748, et seq., 2072-2073; transcript of March 11, 1982). As to the latter motion, the district court acknowledged that the issue of sufficiency was a close question, and that appellant's motion was "non-frivolous" and had to be given serious consideration (transcript of March 11, 1982).

Following his conviction on the conspiracy count, appellant was sentenced on March 26, 1982 to fourteen years incarceration.

The Second Circuit affirmed appellant's conviction holding inter alia that the evidence was sufficient to establish his guilt on the conspiracy charge (Appendix A, slip op. at 2203-2206), that he was not entitled to a severance (Id., at 2214-2217), the the trial court's instructions on aiding and abetting had been proper (Id., at 2217-19), that the contraband seized from appellant at the time of his arrest was admissible (Id., at 2219-20), and that the testifying officers' expressions of opinion concerning appellant's alleged street transactions was admissible (Id., at 2220-2223).

REASONS FOR GRANTING THE WRIT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT APPELLANT WAS GUILTY OF THE CONSPIRACY CHARGE.

The indictment in this case charged appellant Kenneth Thomas with knowingly participating in a nineteen-member conspiracy "to distribute large quantities of heroin" over a seventeen-month period. The government's witnesses admitted, however, that they had never bought any heroin from appellant. Nor had they ever discussed the possibility of such a transaction with him. They likewise admitted that appellant had not participated in, or even been within hearing range of, any of the conversations they had with his brother, Howard Thomas, concerning drug transactions. Nor had appellant even been present when the agents actually purchased any drugs. Rather, the most that the agents could say about appellant was that on a few occasions over a three-week period they observed him engage in activities which, at most, suggested that he might be involved in some undetermined illegal activity, but which fell far short of establishing beyond a reasonable doubt that he was a knowing member of the large-scale conspiracy to distribute "large amounts of heroin" which was charged in Count One of the indictment.

A. The Evidence Failed to Establish that Appellant was a Heroin Dealer.

The government's theory was that appellant was a street seller of heroin which had come from the conspiracy charged. The government's evidence, however, was insufficient to establish even that appellant was a heroin dealer. The principal proof in support of this allegation was the agents' testimony that on several occasions they had observed appellant engage in what appeared to be drug transactions — covertly handing something to someone in exchange for money. The agents conceded, however, that they had no way of knowing what had been exchanged, and that it could just as easily been cocaine or some other illegal item as heroin.

Although appellant was found to be in possession of a small vial and some cellophane envelopes, some of which contained residue of heroin, when he was arrested, this additional evidence still did not establish that appellant was a heroin dealer. Possession of such a small amount of heroin was merely evidence of appellant's own addiction to that drug (transcript of March 26, 1982, at 5); it did not prove that he had been selling any of that drug, however, particularly since appellant also had on his person another small vial containing a residue of cocaine. Consequently, even assuming that the agents were correct in assuming that appellant was engaged in selling something illegal when they observed him, there was no way that the

jury could properly have concluded beyond a reasonable doubt that he was selling heroin, as opposed to cocaine or some other illegal substance. Since the conspiracy charge alleged only heroin distribution, it was essential to the government's theory of the case to prove that appellant was selling heroin, as opposed to some other drug. Its failure to do so is alone sufficient to void appellant's conviction.

B. The Evidence Failed to Establish that Appellant was a Member of the Conspiracy Charged.

Before appellant could properly be convicted of conspiracy, the government was required to prove beyond a reasonable doubt that he was a member of the conspiracy charged in the indictment. See, e.g., United States v. Hysohion, 448 F.2d 343 (2d Cir. 1971). Consequently, even if this Court concludes that the proof in this case was sufficient to establish that appellant was a heroin dealer, that would not be enough to sustain his conviction unless the government also established that he was engaging in that activity as a member of the conspiracy charged. No such showing was made in this case.

The only alleged conspirator with whom appellant was shown to have any contact whatsoever was his brother Howard. Consequently, in order to make it appear that appellant was a member of the conspiracy charged, the government speculated that appellant must have been selling heroin which he was receiving

from his brother. There was absolutely no evidence, however, that appellant had ever received any drugs from his brother or from any member of the conspiracy. Rather, even assuming that appellant was a drug dealer, the record "was altogether equivocal as to the source of his supply". United States v. Reina, 242 F.2d 302, 306 (2d Cir.), cert. denied, 354 U.S. 913 (1957).

The government relied for its proof that appellant must have been getting heroin from his brother solely on the fact that on one single occasion, while the agents were talking to the brother, appellant came over to give him some money. The mere exchange of money between two persons, particularly brothers, falls far short of proving beyond a reasonable doubt that the money is a payment for drugs.

Even if this proffer of money is assumed to be a payment for drugs Howard had previously supplied to his brother, there was no proof that the drug had been heroin, or if it was, that it had come from the conspiracy, as opposed to some other source. Moreover, even if it is assumed that appellant was paying his brother for conspiracy-supplied heroin, there is no proof in this record that he had sold that heroin (a necessary element of the conspiracy charge), as opposed to buying it to

support his own habit. Indeed, it is just as possible on this record that appellant was selling cocaine and then using the money he was making to purchase heroin from his brother or some other source to support his own habit.

The agents also testified that on one occasion while they were talking to Howard Thomas, a woman came over and asked him if he had "anything". According to the agents, Howard told her to "go down there", pointing down the street. Agent West testified that several people, including appellant, were standing in the direction Howard pointed, and that she did not know which particular person Howard was pointing at. The street was described as a place where numerous persons sold drugs. There was no evidence in this exchange that Howard was referring the woman to his brother or even that the woman was looking for heroin as opposed to some other drug. There was no proof whatsoever that Howard was referring the woman to his brother so that she could purchase heroin which Howard had previously supplied to him and which had come from the conspiracy charged.

The fact that appellant was frequently seen in the area when the agents came to talk to his brother is likewise not proof that appellant was a member of the conspiracy charged. It was perfectly natural for appellant to be in that area since, as the agents conceded, he lived there. Moreover, presence and even association with conspirators with knowledge of their criminal activities, is not sufficient to make one a member of

a conspiracy. See, e.g., United States v. Torres, 503 F.2d 1120 (2d Cir. 1974); United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972); United States v. Burgos, 579 F.2d 747, 749 (2d Cir. 1978).

The district court seemed to feel that the fact that appellant helped the agents to find his brother on August 6, 1981, saying that he knew what they wanted, was sufficient to make him a member of the conspiracy, because this meant that he had made the conspiracy "something he wished to succeed" (transcript of March 11, 1981, at 8). Appellant submits, however, that this case is governed by the line of decisions which hold that the mere fact that a defendant knowingly facilitates a drug transaction does not make him a member of a drug conspiracy. See, e.g., United States v. Hysohion, 448 F.2d 343, 347 (2d Cir. 1971). In Hysohion, that Court found that the fact that one of the defendants, himself a drug dealer, had introduced two other drug dealers to each other for the purpose of enabling them to engage in a drug transaction was insufficient to establish that he had become a member of any conspiracy:

> The fact that [defendant] Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud.
>
> United States v. Hysohion, supra, 448 F.2d at 347.

That conclusion is even more compelling here since in Hysohion the conspiracy charge centered around the transaction which Rimbaud had facilitated, whereas here the August 6 discussions between the agents and Howard Thomas after he had been located by his brother constituted only a miniscule event in the activities of the conspiracy charged.

Finally, the fact that appellant, his brother and an unidentified woman walked over and stood for thirty seconds in front of a surveillance agent's car on August 10, 1981 before walking down the street was not proof that appellant was a member of the conspiracy charged. That agent was not even called by the government; consequently, there was not even any evidence that this conduct was intended to intimidate that agent, as the government maintained. Even if it was, however, there was no proof that appellant was engaging in that conduct in order to further his brother's interests; assuming that the government was correct in maintaining that appellant was selling something illegal on the street, it was just as possible that he was engaging in this conduct to protect his own, independent ventures.

In order to convict, the government was required to present clear and convincing proof that appellant was a member of the conspiracy charged. The government presented no direct proof of such membership. Nor was the proof of appellant's peripheral activities when the agents were dealing with his brother sufficient to support an inference of such membership. Consequently, appellant's conviction for conspiracy must be set aside.

C. The Government Failed to Prove Beyond a Reasonable Doubt that Appellant was Sufficiently Knowledgeable of the Overall Scope of the Conspiracy Charged to be Considered a Member of it.

Even if this Court concludes that appellant's activities were sufficient to make him a participant in the agents' unsuccessful efforts to purchase heroin from Howard Thomas in early August, 1981,[5] such a finding would still not be sufficient to establish beyond a reasonable doubt that appellant was guilty of the conspiracy charged. Although a defendant need not be shown to know all of the participants in a conspiracy, he cannot properly be convicted of that crime unless the government at least establishes that he had knowledge of the overall scope of the conspiracy in which he was supposed to be participating. United States v. Tramunti, 513 F.2d 1087, 1112 (2d Cir. 1975); United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971); United States v. Aviles, 274 F.2d 179, 190 (2d Cir. 1960). The record in this case is totally devoid of such evidence. The only member of the conspiracy with whom appellant was shown to have any contact whatsoever was his brother. Appellant never made any statements suggesting that he had knowledge of a broader conspiracy (compare United States v. DeNoia, supra, 451 F.2d at 981 [as to defendants Jacovino and Scorzello]). Nor was he

5/ Appellant did not participate in any way in the agents' purchase of drugs from Howard Thomas and Thomas Wilson on July 21, 1981.

present when statements indicating the scope of the conspiracy were made by other conspirators (compare United States v. Tramunti, supra, 513 F.2d at 1112 [as to defendant Salley]). Appellant was not even present when any transactions or discussions about transactions took place. Consequently, it cannot even be argued that he should have known from the size of those transactions that some broader conspiracy existed (compare United States v. DeNoia, supra, 451 F.2d at 981 [as to defendants Jacovino and Scorzello]).

Indeed, the proof that appellant was sufficiently knowledgeable of the overall scope of the conspiracy charged to be considered a member of it was substantially weaker in this case than it was in numerous other cases which courts have reversed for insufficiency of proof as to this element. In United States v. Tramunti, supra, for example, the evidence showed that one of the defendants, Alonzo, actually bought two ounces of "conspiracy heroin" from one of the conspirators. Moreover, he made statements establishing that he had been a dealer in the past and he intended to start dealing again. Furthermore, he was present in an apartment where one of the conspirators delivered heroin to another conspirator. Nevertheless, the Court found the evidence insufficient to establish that Alonzo had knowledge of the "broader conspiracy". In so holding, the Court noted that the size of the conspiracy alleged by the government is a major factor to be considered in determining whether

the isolated actions of a peripheral defendant will support the inference that he had knowledge of the overall scope of the conspiracy charged. In other words, less evidence will be required to support such an inference if the conspiracy charged is small. United States v. Tramunti, supra, 513 F.2d at 1112, fn. 27. Where, as here and in Tramunti, however, a sizable conspiracy is alleged, clear proof of the defendant's knowledge as to the actual scope of that conspiracy is required. The Court's holding as to Alonzo in Tramunti is equally applicable here:

> Viewed in the entire context of the conspiracy, his act qualitatively is miniscule . . . . When the Government throws out its big conspiracy next to catch the big fish in the criminal sea, it has to be aware that an occasional minnow may wriggle free.
>
> United States v. Tramunti, supra, 513 F.2d at 1112.

In United States v. Reina, supra, 242 F.2d at 306, defendant Valenti was shown to have actually sold drugs to someone in a transaction arranged by a co-conspirator. The government argued that this was sufficient to establish that he was a knowing participant in the conspiracy charged. That Court rejected that argument, saying:

> We would accept this reasoning if we thought that Valenti's sale of the parcel to Pocoroba was evidence that he was cooperating in the series of importations that made up the conspiracy charged. His sale was indeed not inconsistent with that knowledge; but it was

> equally consistent, so far as we can see, with his being an independent peddler of narcotics, whom [conspirator] Shillitani selected as the most immediately available source of supply for Pocoroba's needs.

Likewise, in United States v. Aviles, supra, 274 F.2d at 179, the Court found that defendant Rodriquez' guilty of the conspiracy charged had not been proven despite the fact that he had been shown to have actually purchased drugs from a conspirator:

> We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops [the seller] was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.

And in United States v. DeNoia, supra, 451 F.2d at 981, the evidence was held to be insufficient as to defendant DeNoia, despite the fact that he had been shown on one occasion to have delivered heroin for the conspiracy:

> As to DeNoia, however, we find no independent evidence linking him to the conspiracy. DeNoia's delivery of the heroin is not the kind of single transaction which itself supports an inference of knowledge of a broader conspiracy [citations omitted].

In the present case, there is even less evidence to support such an inference, since appellant was never shown to have bought or sold any conspiracy-originated drugs or even to have had any contact with any conspirators other than his brother.

The district court made no reference to this knowledge requirement in ruling on appellant's sufficiency motion (transcript of March 11, 1982). Rather, it seemed to feel that all that was necessary was to show that appellant did something (i.e., helping the agents to find his brother) which indicated that he was knowingly facilitating a drug transaction. All of the defendants in the above-cited cases were also knowingly facilitating drug transactions, however. Indeed, in each instance, the defendant was a principal party to the transaction. The evidence in each case was insufficient, however, because despite their knowing participation in drug transactions, there was no evidence that the defendants had knowledge of the overall scope of the conspiracy charged. Since there was likewise no evidence of that essential element in appellant's case, his conspiracy conviction should be vacated.

D. Conclusion

At worst, the government's proof suggested that appellant might be a street vendor of some illegal item. Once a jury suspects that, however, they are almost certain to convict, regardless of whether the proof was sufficient to establish that the defendant was guilty of the particular crime with which he is charged. In such circumstances, the judiciary bears a special responsibility to insure that convictions which are not supported by sufficient evidence are not permitted to stand.

Even if appellant's activities, as described by the agents, suggest that he was selling something illegal to people on the street, that does not make him guilty of the large-scale heroin conspiracy charged in this indictment. There is no proof in this record even that appellant was selling heroin, let alone that he was selling heroin supplied by the conspiracy charged in the indictment, and selling it with knowledge of the overall scope of that conspiracy. Absent such proof, appellant's conspiracy conviction must be set aside.

POINT II

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S SEVERANCE MOTIONS.

Even before the trial began in this case, it was clear that appellant would be severely prejudiced by being tried with the other defendants. The indictment charged nineteen defendants with fifteen narcotics offenses, many of which were alleged to be substantial drug transactions involving tens or even hundreds of grams of heroin. Appellant, however, was named only in Count I, which charged all nineteen defendants with membership in a broadly sketched conspiracy. Moreover, even as to that charge, the disproportionality of allegations was striking. Many of the co-defendants were named repeatedly throughout the thirty-two overt acts, which charged them with having participated in numerous large heroin transactions over a sixteen-month period. Appellant was named in only one overt act (#31), in which he was alleged to have sold drugs on a single day at the very end of the conspiratorial period.

The conspiracy alleged was so far-flung, and the number of defendants and crimes charged so unwieldy that the district court repeatedly urged the government during the pre-trial proceedings to seriously consider severing portions of its case (see, e.g., transcript of October 22, 1982 at 8-9, 13-14). Although the government eventually proceeded

to trial against only four defendants, this was not the result of any severance to avoid prejudicing the defendants; rather, the government simply proceeded to trial against all those defendants who had been arrested and who had not entered into plea agreements. As a result, the defendants on trial ranged from one end of the alleged conspiracy to the other. Moreover, the government tried its case as though all nineteen of the defendants named in the indictment were on trial. Consequently, a vast majority of the government's proof concerned defendants who were not even in the courtroom, prompting the district court repeatedly to comment on the cululative nature of the evidence as to absent defendants (T. 621, 691, 708).

The trial itself took over three weeks to try, and involved twenty-four witnesses, a total of one pound of drug evidence and several dozen documents and other exhibits. During that entire period, only two of the government's witnesses made passing reference to appellant, describing him as a peripheral figure during their dealings with his brother, Howard Thomas, on three occasions over a three-week period at the tail end of the conspiracy.

None of the pound of drug evidence presented to the jury during trial was shown to have come from appellant.[6] Moreover,

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6/ A vial and some cellophane envelopes containing heroin residue which were seized from appellant at the time of his arrest were introduced into evidence.

the evidence against appellant was ambiguous at best (see Point I, supra). That fact lost perspective, however, in the deluge of evidence of large-scale transactions and overwhelming proof as to other defendants. Particularly prejudicial to appellant was the stress which the government put on convincing the jury that drugs were a "family business". Indeed, one of the agents quoted Guy Wilkins, the defendant against whom the government had the most proof of guilt and who, the jury learned, had pleaded guilty to the charges in this case, as saying exactly that (T. 54). This claim was substantiated by the fact that many of the co-defendants against whom the evidence was most substantial were related to one another. Thus, Anthony and Phillip Pegues were brothers, Guy Wilkins and Michael Green, a/k/a Michael Wilkins were brothers, and Yvette Carson and Kenneth Nunes were brother and sister. There was also evidence that Guy Wilkins' sister was involved in drugs. Consequently, by the time the jury heard the evidence concerning the Thomas brothers toward the end of the trial, they were already conditioned to assume that fraternal ties were compelling proof of joint involvement in drug activity, particularly when the evidence against one family member was strong, as it was with appellant's brother.[7]

7/ The agents testified that Howard Thomas had participated in three discussions concerning drug purchases and one actual sale. Moreover, his statements to the agents clearly established that he was a dealer in substantial amounts of heroin.

Given the substantial disparity in the charges and the evidence, appellant's severance motions should have been granted. A defendant in a joint trial has a recognized right to a "severance of defendants or whatever other relief justice requires" if it appears that he is "prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together". Rule 14, Federal Rules of Criminal Procedure; United States v. Kelly, 349 F.2d 720, 759 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). In applying this rule, the courts have always kept in mind the problems inherent in trials of conspiracy cases involving numerous defendants. As the Supreme Court noted, in such cases the "liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant . . . ." Glasser v. United States, 315 U.S. 60, 76 (1942). The "dangers of inference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass". Kotteakos v. United States, 328 U.S. 750, 774 (1946); see also, Blumenthal v. United States, 332 U.S. 539, 559-560 (1948); United States v. Mardian, 546 F.2d 973, 977 (D.C.Cir. 1976).

The Courts have long recognized that the danger of transference of guilt is particularly significant in conspiracy cases where, as here, there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants

but not that of the party seeking severance. In such cases, the Courts held, the danger persists that the guilt of the more clearly incriminated defendants will "rub off" on others. United States v. Kelly, supra, 349 F.2d at 756-759. After acknowledging that severance is among the most important safeguards available to minimize such prejudice, the Second Circuit, in what has become known as the Kelly doctrine (see, e.g., United States v. Mardian, supra, 546 F.2d at 977), ruled that severance is required when the evidence against one or more defendants is far more damaging than the evidence against the moving party.

There can be no serious doubt that such was the situation with regard to appellant in the present case. He was charged in only one of the fifteen counts in the indictment, and named in only one of the overt acts in that conspiracy charge. As such, the disproportionality in the charges was considerably greater than that which was found to mandate severance in other cases (see, e.g., United States v. Mardian, supra, 546 F.2d at 977-978 [defendant named in five out of forty-five overt acts]); United States v. Kelly, supra.

The evidence at trial likewise mandated the application of the Kelly doctrine to this case. Even in terms of time, while the government's evidence described continuous involvement of many defendants over the sixteen-month period during which the conspiracy was alleged to have operated, appellant's activities

were limited to three isolated occasions during a three-week period at the tail end of that span. (Compare United States v. Mardian, supra, 546 F.2d at 978 [one month of activity during a twenty-month conspiracy]).

The quantity of evidence was equally disproportionate. Weeks of testimony and a score of drug transactions went by before appellant was even mentioned. (Compare United States v. Kelly, supra; United States v. Mardian, supra.)

The quality and type of the evidence against appellant's co-defendants was also highly disproportionate. Tape recorded evidence and testimony directly involved them in numerous drug discussions and/or transactions. No such evidence existed as to appellant. (Compare, United States v. Sampol, 636 F.2d 621, 646 (D.C.Cir. 1980); United States v. Mardian, supra.)

Moreover, the nature of that evidence — showing sizable sales of heroin, and the frequent employment of children as couriers — undoubtedly had a negative influence on the jury. As such, the Court's words in Kelly are equally applicable here. In that case, the Court noted that the large amount of evidence establishing the "shameless fraudulent practices [of appellant's co-defendants] . . . must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on [appellant] we cannot doubt". (Id., 349 F.2d at 759; see also, United States v. Sampol, supra, 636 F.2d at 646-647).

The need for severance was particularly pressing because the evidence against appellant was so sparce. As the Supreme Court said in Glasser v. United States, supra, 315 U.S. at 67:

> In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial . . .

Here, the weeks of testimony, the bags of heroin evidence, and the overwhelming proof of guilt as to many of appellant's co-defendants could not help but have had an adverse effect on the jury's evaluation of appellant's guilt or innocence. Particularly if the jury suspected that the agents' testimony about appellant's covert exchanges meant that he was involved in some illegal activity, they were likely to overlook the lack of proof as to appellant's alleged membership in the conspiracy or the government's claim that he was selling conspiracy-supplied heroin, and convict him on the basis of the overwhelming evidence of his brother's guilt and the equally overwhelming evidence of the guilt of other family teams. Appellant was entitled to have the small amount of evidence concerning him evaluated by a jury which was not tainted by such prejudicial spill-over. The fact that he was denied that right requires that he be granted a new trial.

POINT III

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE AGENTS' TESTIMONY THAT THEY SAW APPELLANT ENGAGE IN WHAT "APPEARED TO BE DRUG TRANSACTIONS".

Although the government insisted that appellant was a drug dealer, none of its witnesses had ever bought or even discussed buying drugs from him. The government's agents testified, however, that while they were talking to appellant's brother, they observed appellant on several occasions engage in what "appeared to be a drug transaction".

The district court was apparently uncertain as to the admissibility of this conclusory testimony. On several occasions when the agents expressed such an opinion, the district court sustained defense counsel's objection and ordered the characterization stricken (T. 1167-1168, 1268). On several other occasions, however, the agents nevertheless persisted in claiming that appellant was engaging in "drug transactions" (T. 1168, 1399. 1412), despite the fact that they were not parties to the alleged transactions and had no actual knowledge as to what was being exchanged. All they actually saw was appellant exchanging an unidentified object in return for money in such a way as to hide what was in his hand (see, e.g., T. 1168). The agents insisted, however, that they knew these were drug transactions because of their "experience" (T. 1168).

Despite its periodic rulings to the contrary, the district court denied appellant's motion to strike these characterizations as well as the underlying testimony about the covert exchanges (T. 1659, see also 1152-1153, 1173, 1179). The prosecutor was then permitted to rely on these characterizations in summation:

> [The Assistant United States Attorney]: And you remember that they [the agents] saw Kenneth Thomas, who was pointed out to them and he was just standing on the corner doing what appeared to be heroin transactions.
>
> What did that mean?
>
> Mr. Mogulescu: Objection, your Honor.
>
> The Court: Overruled.
>
> (emphasis added) (T. 2103)

The admission into evidence of both the agents' testimony about covert exchanges and their expressions of opinion that these exchanges were drug transactions was prejudicial error.

A. The Testimony Concerning the Covert Exchanges

The issue before the jury in this case was not whether appellant was engaged in some criminal activity or even whether he was a drug dealer, but whether he was selling heroin which had been supplied to him by the conspiracy charged. The agents had no factual basis for claiming that that was what he was doing during the exchanges they described at trial. Rather, all they could truthfully convey to the jury was that

appellant was exchanging something for money in such a way that the agents could not see what was in his hand. Since there was no evidence that appellant's brother or any other conspirator had ever given appellant any heroin and since the agents testified that they could not see what was being exchanged, the jury had no factual basis whatsoever for assuming that these exchanges constituted transactions in conspiracy-supplied heroin. Rather, the most that this evidence could do was to create the impression with the jury that appellant must have been doing something illegal since the agents insisted that he was doing it in a covert fashion. Even if the jurors adopted the agents' speculation that such exchanges were drug transactions, there was no evidence whatsoever that they were sales of heroin, or more particularly, conspiracy-supplied heroin, as opposed to some other drug.

In this posture, this evidence amounted to proof of unspecified criminal activity, never connected to the heroin conspiracy charged in the indictment, but devastatingly prejudicial to appellant. As such, it should have been excluded under Rule 404(b) and 403 of the Federal Rules of Evidence.

Under those rules and the decisions of the courts, evidence of criminal activity which is never shown to be related to the crimes charged is admissible only if the government first establishes 1) that the evidence is relevant to a specific, disputed issue at trial, and 2) that its probative value outweighs

its prejudicial effect on the jury. United States v. Ziegler, 583 F.2d 77, 82 (2d Cir. 1978); United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978); United States v. Falley, 489 F.2d 33, 37-38 (2d Cir. 1973). The disputed issue in this case, and the issue on which the government had no proof (see Point I, supra), was whether appellant was receiving heroin from the conspiracy charged in the indictment. The fact that he was selling something illegal, or even that he was a drug dealer, was not proof of that essential element of the crime charged. What such evidence tended to do, however, was to overshadow that issue in the jury's minds. Once they became convinced that appellant was engaged in some illegal activity, or that he was a drug dealer, they were likely to convict regardless of whether he was ever shown to be a member of the conspiracy charged. As such, the real value of this evidence was to accomplish the goal forbidden by Rule 404(b) — to convince the jury that appellant was a criminal and that he should therefore be convicted regardless of whether the evidence satisfied them that he was guilty of the specific crime charged. United States v. Benedetto, supra; United States v. Ziegler, supra. Since that was the only purpose served by this evidence, it should have been excluded at the trial below.

B, The Agents' Opinion Testimony

The prejudicial impact of the testimony concerning the covert exchanges was further aggravated by the agents' repeated expressions of their opinion that those exchanges must have been drug transactions. Even if one assumes that the possibility that appellant was engaging in sales of drugs he had received from unknown sources was of some probative value in this case, the question of whether that was what he was doing when the agents observed him was a question for the jury, not the agents, to decide. The agents' insistence that appellant must have been engaging in drug transactions, particularly when coupled with their suggestion that they were more competent than the jury to draw that conclusion because of their expert knowledge in this field, violated the Federal Rules of Evidence and deprived appellant of his right to have his guilt or innocence decided by the jury rather than the DEA.

Since the agents admittedly had no personal knowledge as to what appellant was exchanging, their testimony that he must have been exchanging drugs violated Rule 602 of the Federal Rules of Evidence, which provides that:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter . . .

The testimony also violated the Federal Rules relating to the expression of opinions by witnesses (Rules 701-706). The learning of those rules is that opinions, whether given by an expert or a lay witness, are not admissible unless the proponent establishes that they have a sufficient factual basis. This requirement is particularly mandated when the opinions being expressed are not based on some specialized knowledge or experience. Thus, Rule 701 states that:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness . . .

Although the agents sought to portray their opinions as those of experts so as to give them greater impact with the jury, in fact no experience or training was specified by the witnesses, nor can any be imagined by counsel, which would have given these agents the clairvoyance to know what appellant was exchanging. Their insistence that it was drugs was not based on expert knowledge or personal observation, but rather on unjustified speculation.

The agents' expressions of opinion also failed to satisfy the second requirement of Rule 701, which provides that opinions may be expressed by a witness only if they are:

> . . . (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The cases and authorities have consistently held that this requirement is not met where the opinion expressed is not based on expert knowledge but merely tells the jurors the conclusion which the witness believes they should reach on a disputed question of fact. Thus, as Judge Weinstein explains, if a legal controversy centers around the question of whether a particular object is a chair, the witness should not be permitted to testify that the object is a chair. Rather, he should be limited simply to describing the object, without advancing that opinion as to the ultimate issue. Weinstein, Evidence, §701[02], pages 701-715, quoting from King & Pillinger, Opinion Evidence in Illinois 5, (1942). Put somewhat differently, when the validity of a particular inference is one which common knowledge would enable a juror to decide, it is not a proper subject for expert testimony. Cohen v. Western Hotels, Inc., 276 F.2d 26 (9th Cir. 1960); Duff v. Page, 249 F.2d 137 (9th Cir. 1957); Schillie v. Atchison, Topeca and Santa Fe Railroad, 222 F.2d 810 (8th Cir. 1955). Here, the jurors were just as capable as the agents to decide whether the latters' observations were sufficient to justify the inference that appellant was selling drugs. They should have been permitted to do so free of the taint of the agents' speculations.

In this regard, this case is similar to United States v. Cox, 633 F.2d 871, 875-876 (9th Cir. 1980), in which the district court permitted a witness who had testified that the

defendant had told her that he knew of someone who would blow up cars for fifty dollars, to further testify that it was her impression from this statement that the defendant had been involved in a particular bombing. The Court of Appeals held that the admission of this opinion had been error since the validity of such an inference was for the jury, not the witness, to decide.

In United States v. Alexander, 415 F.2d 1352, 1356-1357 (7th Cir. 1969), cert. denied, 397 U.S. 1014 (1970), a mail embezzlement case, the Court of Appeals held that a security officer's testimony that he had observed the defendant sitting in a car attempting to take some unidentified object from under his clothes was admissible because it "did not refer to the stolen mail or other matters beyond the immediate observations of the witness". Here, to the contrary, the agents' testimony did refer to such matters.

* * *

Given the paucity of the government's proof, the case against appellant, assuming it was sufficient, was at most a borderline showing. In this context, the evidence that appellant had engaged in covert exchanges of unspecified items, particularly when coupled with the testimony by DEA "experts" that these were drug transactions, would certainly have had a substantial, and possibly a deciding, influence on the jurors. Since this evidence

failed to satisfy the tests set forth in the Federal Rules of Evidence, its introduction at appellant's trial requires that his conviction be set aside.

POINT IV

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT HIS CHARGE ON AIDING AND ABETTING WAS NOT APPLICABLE TO THE CONSPIRACY CHARGE.

As part of his charge to the jury, the district court instructed them that anyone who "aids, abets, counsels, commands, induces . . . procures . . . assisted . . . knowingly and wilfully associated himself or herself in some way with the criminal venture and intentionally participated in it as something he or she wished to bring about and had a stake in the outcome . . . [or] knowingly and wilfully seek by some act to make a criminal venture succeed" is punishable as a principal (A 080-082). He later repeated this instruction in response to a note from the jury asking for "clarification of what intent means as stated in the indictment" (T. 2347-2351).

That word was used repeatedly in the conspiracy charge in the indictment and it could well have been in connection with their deliberations on this count that the jurors were seeking this clarification. Nevertheless, the district court refused appellant's repeated requests for the court to clarify to the jurors that his instructions on aiding and abetting were not to be considered in connection with the conspiracy count (T. 2317, 2405).

An individual can properly be convicted of the crime of conspiracy only if the government establishes beyond a reasonable doubt that he intentionally became a member of that conspiracy (see, e.g., United States v. Hysohion, 448 F.2d 343 (2d Cir. 1971) and that he did so with knowledge of its overall scope (see, e.g., United States v. Tramunti, 513 F.2d 1087, 1111 (2d Cir. 1975). Although the court did instruct the jury as to those elements of the crime of conspiracy, his later instructions on aiding and abetting, coupled with his instruction that aiders and abettors are punishable as principals, clearly suggested that even if someone was not shown to be a member of the conspiracy charged, he could be convicted of that crime if it was shown that he had aided and abetted someone who was a member.

This instruction was particularly prejudicial to appellant. By applying it to the conspiracy count, the jury could have convicted him even though they felt that the evidence was insufficient to establish his knowing membership in the conspiracy, simply because he had aided and abetted one of its attempted sales by helping the agents to locate his brother on August 6, 1981. Such a finding would have made appellant merely a casual facilitator rather than a conspirator; consequently, his conviction on that basis would have been improper. United States v. Hysohion, supra. Since the judge's instructions permitted the jury to convict on such a theory, appellant's conviction must be set aside.

POINT V

THE DISTRICT COURT ERRED IN ALLOWING THE GOVERNMENT TO INTRODUCE INTO EVIDENCE THE TESTIMONY THAT WHEN APPELLANT WAS ARRESTED, HE WAS IN POSSESSION OF A SMALL VIAL AND SOME CELLOPHANE ENVELOPES, SOME OF WHICH CONTAINED A RESIDUE OF HEROIN.

The last evidence pertaining to appellant in this case concerned August 10, 1981. In legal terms, the conspiracy ended on October 13, 1981, the date on which the indictment was filed (A 010). It was also over in practical terms by that date, since most of the conspirators, including appellant's brother, had already been arrested. Nevertheless, the government was permitted to introduce into evidence over appellant's objection testimony of the agents who arrested appellant that when he was searched incident to that arrest, he was found to be in possession of a small vial and several cellophane envelopes, some of which contained a residue of heroin.

Since the conspiracy had already ended, appellant's possession of these items could in no way have been an act in furtherance of that conspiracy. Moreover, the government introduced no proof that the heroin residue on the items found on appellant's person had come from conspiracy sources. To the contrary, since appellant's brother, who the government was insisting was appellant's only source of conspiracy heroin, had been in jail for over a week, there was little or no

possibility that said residue had come from conspiracy drugs. There was not even any evidence that appellant, himself a heroin addict, was selling the heroin found on his person as opposed to using it himself.

As such, this evidence amount to proof of an uncharged crime — possession of a controlled substance. It was not relevant to any element of the crime charged; rather, it served only to convince the jury that appellant was a criminal who should be convicted regardless of his guilt or innocence of the crime charged. Rule 404(b), Federal Rules of Evidence. Moreover, as the only drugs ever connected to appellant, this evidence was highly prejudicial. Rule 403, Federal Rules of Evidence; United States v. Falley, 489 F.2d 33, 37-38 (2d Cir. 1973). Since the evidence was not relevant to the crime charged, and since it was so prejudicial, appellant's conviction should be set aside. United States v. Falley, supra; United States v. Benedetto, supra.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 149, 150, 151—August Term, 1982

(Argued October 19, 1982 Decided March 4, 1983)

Docket Nos. 82-1109, 82-1113, 82-1115

UNITED STATES OF AMERICA,

Appellee,

—v.—

YVETTE CARSON, LEMUEL MONT, a/k/a "Lam," and KENNETH THOMAS, a/k/a "Kenneth Davis,"

Defendants-Appellants.

Before:

OAKES and WINTER, *Circuit Judges,*
and MACMAHON, *District Judge.**

* Of the Southern District of New York, sitting by designation.

Appendix A

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York after a four-week jury trial before Brieant, *Judge*, for conspiracy to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846, and for distribution and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2.

Affirmed.

PATRICIA ANNE WILLIAMS, New York, New York (John S. Martin, Jr., United States Attorney for the Southern District of New York, Roanne L. Mann and Walter P. Loughlin, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee*.

VICTOR J. HERWITZ, New York, New York, *for Defendant-Appellant Carson*.

BARRY A. SCHWARTZ, New York, New York (Hermena Perlmutter and Salvatore A. Quagliata, New York, New York, of counsel), *for Defendant-Appellant Mont*.

MICHAEL YOUNG, New York, New York, *for Defendant-Appellant Thomas*.

MACMAHON, *District Judge*.

Yvette Carson, Lemuel Mont and Kenneth Thomas appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after a four-week jury trial before Honorable Charles L. Brieant, *Judge*.

The fifteen-count indictment charged Carson, Mont, Thomas and sixteen co-defendants with violations of the federal narcotics laws. Count 1 charged all defendants with conspiracy to distribute heroin and to possess it with intent to distribute from June 1980 until October 1981, in violation of 21 U.S.C. § 846 (1976).[1] The remaining counts (Counts 2 through 15) charged various defendants with distribution of heroin and possession with intent to distribute, in violation of 21 U.S.C. §§ 812, 841(a)(1), (b)(1)(A) (1976), and 18 U.S.C. § 2 (1976).[2] Carson was

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1 21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2 21 U.S.C. §§ 841(a)(1), (b)(1)(A) provide:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
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> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> (b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15

charged in three substantive counts (Counts 13 through 15) and Mont in seven counts (Counts 3 through 9). Thomas was named in the conspiracy count only.

Trial commenced against Carson, Mont, Thomas and co-defendant Gayburnetta Galloway.[3] At the close of the government's case, Judge Brieant dismissed Count 13 against Carson and Counts 3 through 6 against Mont and consolidated Counts 8 and 9 which named Mont.

After deliberating for three days, the jury found Carson guilty of the conspiracy count and one of the remaining substantive counts (Count 15), but found her not guilty on the other substantive count (Count 14). Mont was found guilty on the conspiracy count, the consolidated substantive count (Count 8), and the remaining

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years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3 Of the remaining fifteen defendants, eleven have pleaded guilty and are serving their sentences. Four defendants remain at large.

substantive count (Count 7). The jury found Thomas guilty on the conspiracy count. Galloway was found not guilty on the conspiracy count, and the jury was unable to reach a verdict as to her on the substantive count (Count 15).[4]

Viewed most favorably to the government, the proof showed a loosely-knit organization engaged in the distribution of heroin. Initially occupying the upper echelon were Fred Galloway and Fred Chaffin, who received heroin from sources identified as "the Italians" and distributed it through their network of associates. Chaffin was ultimately supplanted by Carson, who was affiliated with Guy Wilkins. Prior to his ouster in the summer of 1981, Chaffin served as both source and partner to the conspirators at the next level of distribution, Carson, Mont, and, at times, Guy Wilkins. These individuals cut heroin for further distribution and engaged in wholesale transactions as well. Carson's subordinates included her brother, Kenneth Nunes; Thomas Wilson; appellant Thomas and his brother, Howard Thomas; and the workers in Carson's cutting mill located at her residence. Wilkins' subordinates were Arthur Collins; Wilkins' brother, Michael Green; and Anthony and Philip Pegues. Working as distributors for Mont were Shawn Lovett; David Wilkins; and, prior to his advancement through the organization, Guy Wilkins. The roles of the various

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4 Judge Brieant sentenced Carson to consecutive terms of imprisonment of fifteen and five years on Counts 1 and 15, respectively, to be followed by a special parole term of three years. Mont was sentenced as a second felony offender, pursuant to 21 U.S.C. § 851, to concurrent terms of imprisonment of thirty years on Counts 1, 7 and 8, to be followed by lifetime special parole. Thomas was sentenced to fourteen years on Count 1. Gayburnetta Galloway entered into a deferred prosecution agreement with the government following trial with respect to the substantive charge.

defendants became apparent during the course of sixteen months of undercover investigative work by agents of the Drug Enforcement Administration ("DEA"), who made fourteen purchases of high-quality heroin for approximately $151,400, and two pounds of quinine.

The principal evidence linking each appellant to the conspiracy is:

MONT

The evidence demonstrated that Mont was a major distributor of heroin. He was variously described as owning or operating the *Our Place Bar*,[5] a heroin marketplace. Thus, on several occasions, Guy Wilkins sold heroin to DEA Agents Baker, Coleman and Williams at or in the vicinity of the *Our Place Bar*. On August 13, 1980, Wilkins sold a sample to the agents and informed them that he and his brother, David Wilkins, received their heroin from the same source—the owner of the *Our Place Bar*.[6] During this sale, the agents indicated that they could sell quinine to Wilkins' source, and Wilkins agreed to arrange a meeting between his source and the agents. On September 29, 1980, Guy Wilkins sold the agents two ounces of heroin for a price of $20,000 at the *Our Place Bar*.

Mont's heavy involvement in the heroin business was solidly shown by his dealings with the agents in October

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5 The *Our Place Bar* was legally owned by an entity whose sole officer was Hope Haynes, a friend of Mont. Mont described himself as a bar owner on an application for an account with a brokerage firm. After his arrest, Mont told the agents that he was a bar manager.

6 On August 12, 1980, Agent Coleman unsuccessfully attempted to pick up the heroin sample. Upon arriving at the *Our Place Bar* that day, Coleman overheard Guy Wilkins speaking to an individual named "Lam" on the telephone. "Lam" was Mont's nickname, as evidenced by a bracelet he wore that read "LAM" in diamonds.

1980. On October 3, Agents Baker and Coleman met with Mont at the *Our Place Bar*, and he agreed to purchase liquor from them.[7] En route to Queens to pick up the liquor, Baker told Mont that he was unhappy with the Wilkins brothers and was seeking a reliable source of heroin. Baker also offered to sell some quinine. Mont replied that he had heroin connections and could supply the four ounces that Baker wanted. After picking up the liquor, they returned to the bar, where Mont paid Baker $900 for the liquor in $100 bills. The serial numbers on two of the bills matched those on two of the bills that the agents had paid to Guy Wilkins for the heroin the agents bought on September 29. Mont stated that his connection was returning that evening and that the agents should remain at the bar. After a wait of two hours, nobody appeared and the agents left.

On October 27, Mont asked Baker about the quinine that Baker had offered on October 3. Baker replied that he had ten pounds left Mont was interested and said he would speak to his connection about selling heroin to Baker. The following day, Guy Wilkins called Agent Coleman seeking immediate delivery of a pound of quinine for David Wilkins and Mont. Wilkins stated that he, his brother David, and Mont were partners in the heroin business. That evening, Agents Baker and Williams sold the pound of quinine to Mont at the *Our Place Bar* for $400. When informed as to what Wilkins had said about Mont's partnership with Guy and David Wilkins, Mont replied that Guy Wilkins used Mont's name when Wilkins wanted "some clout in his commitments." When

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7 The possibility of selling "stolen" liquor to Mont was raised first by Agents Baker and Coleman in a September 12, 1980 meeting with Guy Wilkins. Wilkins agreed to mention the liquor to "the owner of the *Our Place Bar*."

Baker asked Mont about purchasing heroin, Mont indicated that he would have his connection bring a sample to the bar the next day.

On the following day, October 29, Agents Baker and Coleman arrived at the *Our Place Bar,* where they observed Mont, David Wilkins and Shawn Lovett conversing. David Wilkins went to the telephone, and Mont told the agents that he was trying at that very moment to get his heroin connection to bring a sample to the bar. David Wilkins and Lovett left the bar after again speaking with Mont. Guy Wilkins arrived and told the agents that he had received the quinine that they sold to Mont, that David Wilkins had given Mont the money to pay for the quinine and that Mont had recently sold David Wilkins an eighth of a kilogram of heroin.

CARSON

Carson's role in the conspiracy was shown in a series of meetings between the conspirators and the agents. On July 21, 1981, Wilkins agreed with the agents to arrange their purchase of heroin from Fred Galloway. Subsequently, on July 25, the agents went to the *Flash Inn* at the appointed time and place. When Wilkins arrived, he was accompanied by Carson, whom he introduced as his "partner." Carson told the agents that she had met Wilkins through Fred Chaffin and acknowledged that she and Wilkins were now partners. Wilkins, Carson and Agent Johnson discussed the irony of Wilkins' dealing Carson's narcotics over a year, although neither was known to the other. Wilkins stated that Carson had an overseas heroin connection,[8] and Johnson asked Carson

[8] On July 17, 1981, Guy Wilkins told Agent Baker, when Baker inquired about sources of heroin, that he, Wilkins, had "made con-

how it worked. Carson replied that a friend of hers had the connection, that her friend employed overweight women to carry the heroin into the country on their person, and offered to act as an intermediary between her friend and the agents if the agents wanted to buy heroin. Agent Williams asked Carson if she knew the people whom they were going to do business with that morning. Carson stated that she did and that she had met them through her "old man."

Later that day, at *Close Encounters Discotheque*, where the sale was consummated, Carson elaborated on her role in the heroin business.[9] She told Agent Williams that her "old man" was in jail, that she was running his heroin business, and that she had to be careful because she wanted to save money to "set him up right" upon his release from prison. She also stated that she had been Chaffin's partner for quite a while and that their partnership had ended "just recently."

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tact" with Carson and another woman. This "other woman," Wilkins indicated, imported the heroin. Wilkins also stated that if Baker were to meet with her, he, Baker, would not need to deal with anyone else.

At the July 17 meeting, Wilkins also stated that Chaffin, from whom the agents had bought heroin, had fallen out of favor with other conspirators because he owed over $100,000 to "the Italians" and over $58,000 to "Can Do's" (Kenneth Nunes') sister, Carson. Carson confirmed this on the morning of July 25, 1981, while driving to the *Close Encounters Discotheque*, indicating to Agent Williams that Chaffin could not be trusted because he owed people money. Chaffin, Carson said, owed her $58,000 for a heroin package, along with an additional $12,000. Later, at the discotheque, Carson told Agent Johnson that Chaffin was there because he wanted to borrow money, but that his credit was bad because he owed people money, confirming the figures that Wilkins had stated previously. According to Carson, "the Italians" had advanced $100,000 worth of heroin to Chaffin because she vouched for him, but Chaffin failed to repay them. Because of this, Carson had severed her relationship with Chaffin and taken on Wilkins as a new partner.

9 For a fuller description of the events of July 25, see the discussion of Carson's conviction on the substantive count, *infra*.

On July 28, 1981, Agents Johnson and Baker met with Guy Wilkins and Carson's son, Kevin, at the *Flash Inn*.[10] Wilkins stated that he and Carson each had a half-pound of heroin and needed quinine. Later that day, Johnson and Baker met with Wilkins and Carson at a *Jack-in-the-Box* restaurant in the Bronx. Carson said that she was rushed because of the presence of customers from Washington, D.C., to whom she was selling heroin. She also told Johnson that she would meet two potential sources later in the week and that she was "not too sure" about one but "85 per cent sure" of the other. Baker told Carson that he wanted to become her partner and asked her to mention him to her "Italian source," whom she planned to meet on July 30. Carson also reiterated the existence of her partnership with Wilkins.

On July 31, 1981, Agents Baker and Williams met with Wilkins, and Baker asked Wilkins what had become of Carson. Wilkins stated that Carson had visited a prison to obtain a reference for her introduction to some "Italian sources." Baker then asked if Carson had spoken to the "Italian source" regarding Baker's becoming a partner. Wilkins replied that the source had refused to meet with Baker.

The scope of Carson's involvement in the conspiracy was further evidenced in an aborted heroin transaction which took place on August 10, 1981. On that date, Agents West and Johnson met with Howard Thomas and Kenneth Nunes, Carson's brother, to purchase heroin. Nunes stated that he had to call his sister to approve the deal, then left the group and placed a telephone call.

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10 Baker and Johnson also met with Wilkins a day earlier, on July 27. Wilkins informed the agents that Carson was unable to attend the meeting because she had to prepare for a sale of heroin to customers who had come to New York from Washington, D.C.

When he returned, Nunes said that his sister did not want to deal with the agents because Johnson asked "a lot of questions" the last time he met with her. On that evening, Howard Thomas also informed Agent West that Nunes was Carson's brother and that since Johnson knew Nunes, Johnson could go to Carson's house, which was the cutting mill. There, Thomas said, Carson employed six or more persons to cut and package heroin.

On August 12, 1981, Agent West, accompanied by an informant, conversed with Howard Thomas regarding Nunes' refusal to deal with the agents on August 10. Thomas indicated that Nunes had told him that Carson did not want to conduct business with Agent Johnson because the agents had asked "too many questions" on July 25. Thomas, apparently referring to the July 25 sale, also said that Carson had done a prior deal with Agents Johnson and West, and that Nunes was a runner and cutter for Carson.

KENNETH THOMAS

Evidence tying Thomas to the conspiracy is as follows: On July 21, 1981, Agents Johnson and West negotiated with Kenneth's brother, Howard Thomas ("Howard"), for the purchase of one ounce of heroin. During the course of the negotiations outside the *Star Lounge*, the agents observed Thomas engaging in what appeared to them to be drug transactions, *i.e.*, individuals approached Thomas and gave him money in exchange for something furtively handed to them by Thomas. Later that day, Howard introduced the agents to Thomas Wilson ("Hillside"), who sold them approximately one ounce of heroin for $8,500.

On August 6, 1981, Agents Johnson and West returned to the vicinity of the *Star Lounge*, where they asked

Thomas if he could locate Howard. Thomas replied that Howard had told him what the agents wanted. Thomas then entered the agents' car and directed their search for Howard, whom they eventually found at the *Star Lounge*. Howard approached the car and Thomas left, positioning himself on a street corner. A short time later, Thomas approached Howard and attempted to hand him some money; Thomas was told to wait, and he returned to the corner. Thereafter, a woman approached Howard and asked if he "had anything;" Howard directed her to the corner where Thomas and others were standing.

On August 10, 1981, the agents again returned to the vicinity of the *Star Lounge*, where they met Howard. Howard indicated that his sources were temporarily out of heroin but would be resupplied that evening. Later, while waiting for Wilson to arrive, Howard told Agent Johnson that Wilson was one of only six or eight people who could go to the mill where the heroin was cut and that he, Howard, had been there only eight times during the past two and one-half years. While waiting, the agents watched Thomas, Howard and others engaging in numerous furtive exchanges which appeared to the agents to be narcotics transactions.

Later that evening, Howard suggested that the agents buy heroin from another source, which he indicated as someone sitting in a Lincoln Continental parked in front of the agents' car. When the agents seemed reluctant, Howard assured them that this person's heroin was from the same source as that provided by Wilson. The agents agreed to buy the heroin from the person in the Lincoln Continental, but the transaction did not take place because Thomas, Howard and a young woman spotted a surveillance vehicle across the street, walked toward it, and stood facing the vehicle for a short time. The driver

of the Lincoln Continental spoke briefly to the surveillance agent, who thereupon drove away from the area. Howard then advised the agents that there were a lot of police nearby.

On October 20, when Thomas was arrested, he had upon his person two small glass vials (one with traces of heroin and another with traces of cocaine), one cellophane bag containing traces of lactose, and several small empty cellophane bags.

DISCUSSION

A. Claim Common to All Appellants: Single v. Multiple Conspiracies.

Mont argues that the evidence established multiple conspiracies rather than the single conspiracy charged in the indictment. Carson and Thomas adopt this argument; in addition, they challenge the sufficiency of the evidence supporting their convictions on the conspiracy count. Judge Brieant charged the jury on the issue of multiple conspiracies, and no appellant claims error in the charge. Our inquiry, therefore, is directed to whether the evidence supports the jury's finding that the government proved the conspiracy charged in Count 1 and each defendant's participation in it.[11] *United States* v. *Alessi*, 638 F.2d 466,

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11 As we have noted on many occasions, whether the evidence shows multiple conspiracies is normally a question of fact for a properly instructed jury. *United States* v. *Alessi*, 638 F.2d 466, 472 (2d Cir. 1980); *United States* v. *Murray*, 618 F.2d 892, 902 (2d Cir. 1980); *United States* v. *McGrath*, 613 F.2d 361, 367 (2d Cir. 1979); *United States* v. *Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied sub nom. Salley* v. *United States*, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917, 97 S.Ct. 1330, 51 L.Ed.2d 595 (1977).

472-73 (2d Cir. 1980); *United States* v. *Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied sub nom. Salley* v. *United States*, 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977).

The law regarding claims that the proof demonstrates multiple conspiracies was recently summarized by us in *United States* v. *Alessi*, *supra*, 638 F.2d at 472-73. We inquire whether the evidence

> supports a finding that the alleged conspiracy was proved and that each appellant was a member of it and, if not, whether the variance substantially prejudiced any of the appellants. Having in mind that "the gist of the offense remains the agreement," *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964), *cert. denied sub nom. Mogavero* v. *United States*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965), we must, in order to resolve these issues, examine the evidence to determine what kind of agreement or understanding could reasonably have been found to exist as to each appellant. This requires a review of the defendants' activities as a whole in order to determine the scope of the criminal enterprise or enterprises and whether any of them fits the pattern of the conspiracy alleged in the indictment. The next step is to review each appellant's conduct and statements to determine whether it could reasonably be inferred that he participated in the alleged enterprise with a consciousness of its general nature and extent. . . . Proof of an appellant's membership depends upon the extent of his knowledge, given the scale of the criminal enterprise (citations omitted).

Count 1 charged the defendants with a conspiracy, extending from June 1980 through October 1981, to

possess with intent to distribute and to distribute heroin. There was evidence from which the jury could have found the existence of a single conspiracy. When viewed in the light most favorable to the government, the proof showed that Fred Galloway and Fred Chaffin distributed large quantities of heroin that they received from sources identified only as "the Italians."[12] The connection between Galloway and Chaffin, on the one hand, and Guy Wilkins,[13] on the other, was evidenced during a sale of $45,000 worth of heroin to the agents on May 28, 1981. The agents paid $40,000[14] to Wilkins, who placed it in a shoulder bag. After the sale, Chaffin entered the resi-

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12 The importance of the "Italian connection" was illustrated in May 1981, when heroin was in short supply. On May 20, Guy Wilkins informed the agents that there was no heroin available because of the death of one of "the Italians" and a resulting reorganization. The reorganization, Wilkins said, involved Chaffin and a friend of Chaffin's, for whom "the Italians" had purchased a discotheque in Westchester County. On May 27, 1981, Wilkins and Chaffin each told the agents that Chaffin had two partners with direct connections to "the Italians" and that these partners received their heroin in fifteen-kilogram lots. Later, on July 17, 1981, Wilkins told the agents that Fred Galloway received his heroin from the same source—"the Italians"—as Chaffin did.

13 Initially, Guy Wilkins sold the agents heroin that he had obtained from Mont and David Wilkins. However, David Wilkins, suspecting that the agents were agents, was reluctant to deal with them, and Guy Wilkins began searching for new sources of heroin. Guy Wilkins found his new source in Chaffin, and together they dealt with the agents from November 1980 to June 1981. Thereafter, Chaffin fell out of favor with "the Italians" and others, and Guy Wilkins began his partnership with Carson.

Additional evidence of a Guy Wilkins-Fred Galloway connection is an aborted sale of quinine by the agents to Galloway, which took place on August 4, 1981. On that date, Agents Baker and Johnson, along with Guy Wilkins, delivered a barrel of quinine to the *Close Encounters Discotheque*. Galloway, refusing to speak directly with the agents, sent word through Wilkins that he did not need quinine at that time and preferred cash payments for heroin.

14 The remaining $5,000 was paid on June 23, 1981.

dence of Galloway carrying the bag but emerged shortly thereafter without it.[15] The relationship between Chaffin and Carson was admitted by Carson—by her own account, they had been partners. Moreover, Carson and Wilkins admitted to a partnership relation between them after the ties between Carson and Chaffin had been severed. It was at this time that Carson established direct connections to "the Italians." The outlines of the conspiracy at its lower levels was also established at trial: Mont served as source and partner to David Wilkins, and as a source to Guy Wilkins prior to his rise through the organization. Moreover, there is evidence that Carson operated a heroin mill out of her home and employed "Hillside," the Thomas brothers and others as lower-level distributors.

Denying any connection between Chaffin and himself and claiming that Guy Wilkins had multiple unrelated sources, Mont argues that the proof showed multiple conspiracies. There was evidence, however, from which a Mont-Chaffin connection could be found. Thus, in October 1980, when Wilkins introduced Chaffin to the agents as his new source, Wilkins, nevertheless, indicated that Mont and Chaffin were affiliated and further stated that Mont and David Wilkins did not wish to be cut out of their profit as intermediaries. This suggests strongly that Mont had been receiving heroin from Chaffin. Moreover, on February 23, 1981, Shawn Lovett, who worked for David Wilkins, spoke with Chaffin immediately prior to picking up a kilogram of heroin for David. During this period, Mont and David Wilkins were partners in the heroin business. Finally, both Carson and Guy Wilkins

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15 Thereafter, Chaffin, Wilkins and an unidentified female drove to the residence of Carson, from which Chaffin and Wilkins emerged after a short period of time.

acknowledged the irony of Wilkins' dealing Carson's narcotics for over a year when neither knew the other personally. During this period, Wilkins was distributing heroin for Mont and Carson was Chaffin's partner.

In any event, there was substantial cooperation between Mont and Guy Wilkins even after Wilkins established his relationship with a "new" source of heroin, Chaffin, in October 1980. Wilkins obtained some of the quinine that Mont and David Wilkins had purchased from the agents and used it to cut heroin he received from Chaffin. David's arrangement to pick up heroin from Chaffin in February 1981 further demonstrates the mutual assistance between Mont and David Wilkins, on the one hand, and Chaffin and Guy Wilkins on the other. In short, the proof at trial "revealed the existence of . . . unlawful operations by functional interlocking groups . . . who were virtually dependent on one another for overall success." *United States* v. *Alessi*, *supra*, 638 F.2d at 473. The inference that there was one loose-knit conspiracy as alleged is justified. *See United States* v. *Panebianco*, 543 F.2d 447, 452-53 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1128, 51 L.Ed.2d 533 (1977); *United States* v. *Tramunti*, 513 F.2d 1087, 1106-07 (2d Cir.), *cert. denied*, 423 U.S. 32, 96 S.Ct. 54, 46 L.Ed. 50 (1975); *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974); *United States* v. *Bynum*, 485 F.2d 490, 495-97 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974).

Turning to appellants' knowledge and participation, there was sufficient evidence to sustain the jury's conviction of Mont, Carson and Thomas on the conspiracy charge. The proof shows that Mont conducted a substantial heroin business from the *Our Place Bar*. In addition to the transactions outlined above, there was testimony

from which the jury could infer that Wilkins and his brother David received from Mont and sold a kilogram of heroin every week. Moreover, in his conversation with Agent Baker, Mont indicated that he anticipated no problem in satisfying Baker's demands for heroin. Mont had subordinates, such as David and Guy Wilkins, who assisted him in the distribution chain. Mont also observed the advancement of Guy Wilkins through the organization, providing him with assistance in the form of quinine. The evidence, therefore, sustains the jury's finding that Mont had knowledge of the outlines of the enterprise, *United States* v. *Alessi*, *supra*, 638 F.2d at 474, and "knew from the scope of [its] operation that others were involved in the performance of functions vital to the success of the business." *United States* v. *Sisca*, 503 F.2d 1337, 1345 (2d Cir.), *cert. denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974) (quoting *United States* v. *Bynum*, *supra*, 485 F.2d at 496; *United States* v. *Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926, 92 S.Ct. 978, 30 L.Ed.2d 801 (1973)). The government, of course, was under no obligation to show that Mont "knew every other member or was aware of all acts committed in furtherance of it." *United States* v. *Alessi*, *supra*, 638 F.2d at 473.[16]

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[16] Mont argues that "the record is conspicuously silent of [sic] even the slightest reference to Mont from October 31, 1980 to October 4, 1981, the day Mont was arrested" (reply brief at 14). However, it is well settled that "participation in a conspiracy may continue beyond the performance of an overt act by the alleged conspirator, if the conspiracy continues in existence thereafter," *United States* v. *Cianchetti*, 315 F.2d 584, 589 (2d Cir. 1963), and that a turnover in personnel does not necessarily terminate a conspiracy, *United States* v. *Penebianco*, 543 F.2d 447, 453 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977) (citing cases). In *United States* v. *Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863, 80 S.Ct. 123, 44 L.Ed.2d 102 (1959), neither a year-long hiatus in the government's evidence nor the absence of mention of the appellants in the post-

Regarding Carson's involvement, she was, by her own admission, a partner of Chaffin, and then Wilkins, in the heroin trade. Carson's initial partnership with Chaffin dissolved after Chaffin became substantially indebted to both Carson and "the Italians." She also admitted dealing directly with customers from Washington, D.C. Moreover, the evidence showed that Carson used her residence as a cutting mill, where six or more people diluted and packaged heroin, and that she employed Hillside and the Thomas brothers as lower-level distributors. The jury was warranted in concluding that Carson knowingly participated in the conspiracy.

Evidence of Thomas' participation in the conspiracy is less compelling. However, the standard for appellate review of an insufficiency claim placed a "very heavy burden" on the appellant. *United States* v. *Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2945, ___ L.Ed.2d ___ (1982). Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560, 572 (1979); *United States* v. *Barnes*, 604 F.2d 121, 157 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, we must view the evidence in the light most favorable to the government, *Glasser* v. *United*

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hiatus evidence required reversal of appellants' convictions. *Id.* at 263-64. And in *United States* v. *Brewer*, 630 F.2d 795 (10th Cir. 1980), the conviction was affirmed despite the fact that the appellant disappeared from the conspiracy when his narcotics supplier and his customer began dealing directly. *Id.* at 799-800. That the agents' investigation did not focus on Mont after October 1980 is irrelevant to the question whether the evidence demonstrates that Mont knowingly participated in the conspiracy charged in the indictment.

States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680, 704 (1942), and construe all permissible inferences in its favor, *United States* v. *Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 81, ___ L.Ed. ___ (1982). Moreover, participation in a conspiracy may be proven by circumstantial evidence. *See United States* v. *Barnes*, *supra*, 604 F.2d at 156 and cases cited therein. Applying these standards, we hold that the evidence supporting Thomas' guilt on the conspiracy charge is sufficient.

Indicative of Thomas' membership in the conspiracy were, of course, his furtive street-corner activities, which the jury could infer were drug transactions. Although this proof, taken alone, is insufficient to support the conclusion that Thomas was dealing conspiracy heroin, there is more. Thomas' activities on August 6, 1981 are of great significance. The agents, as noted above, were looking for Howard Thomas pursuant to a prearranged agreement to purchase heroin from him. Fully aware of the agents' purpose, because Howard had told him, Thomas successfully assisted the agents in their search. From this, the jury was entitled to conclude that Thomas was knowingly facilitating a heroin sale between Howard Thomas and the agents.

The same conclusion could be drawn with respect to Thomas' participation in an aborted heroin sale on August 10. On that occasion, Thomas, along with Howard Thomas and an unidentified woman, approached and stared at a DEA agent parked across the street from the heroin seller who occupied the Lincoln Continental. Thereafter, Howard cautioned the agents concerning the police presence. This "seemingly innocent act, when viewed in the context of surrounding circumstances," justified "an inference of complicity." *United States* v.

Calabro, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 428, 30 L.Ed.2d 735 (1972). When this evidence of knowing assistance is viewed in conjunction with Thomas' street-corner activities, which take on color in light of Howard's extensive heroin dealing, *United States* v. *Tramunti*, *supra*, 513 F.2d at 1108-09, it was reasonable for the jury to conclude that Thomas was a member of the conspiracy, albeit at the retail level. This inference is strengthened upon consideration of evidence that the location where Thomas transacted his business was a heroin market—thus, the presence on this block of the heroin supplier in the Lincoln Continental and the proximity of the grocery store operated by Howard's heroin partner, "Hillside."

Thomas urges exculpatory explanations for each strand of evidence. However, "pieces of evidence must be viewed not in isolation but in conjunction." *United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). In this case, as in *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953, 82 S.Ct. 395, 7 L.Ed.2d 386 (1962), "each of the episodes gained color from each of the others." *See also*, *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). The government's proof need not "exclude every reasonable hypothesis, other than that of guilt" to support a conviction. *Holland* v. *United States*, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954); *United States* v. *Taylor*, 464 F.2d 240, 244 (2d Cir. 1972); *see also*, *United States* v. *Lubrano*, 529 F.2d 633, 636 (2d Cir. 1975), *cert. denied*, 429 U.S. 818, 97 S.Ct. 61, 50 L.Ed.2d 78 (1976).

Thomas also contends that the government has failed to prove that he had knowledge of the overall conspiracy

in which he participated. However, Thomas' membership was evidenced by continuing street-corner sales along with isolated instances in which he attempted to further or protect the business. Therefore, "[t]he jury could properly infer that [Thomas] had knowledge of others above him in the chain of distribution and that he was dependent on their activities. . . ." *United States* v. *Barnes*, *supra*, 604 F.2d at 159. *See also*, *United States* v. *Taylor*, *supra*, 562 F.2d at 1352-53, 1354; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1110, 1112. Thus, the "single act" doctrine upon which Thomas relies, *see United States* v. *Torres*, 503 F.2d 1120, 1123-24 (2d Cir. 1974) and cases cited therein, is inapposite here. Moreover, there is evidence that Thomas was aware of drug transactions in which he did not participate directly—those involving his brother Howard and the agents. In short, "it could reasonably be inferred that [Thomas] participated in the alleged enterprise with a consciousness of its general nature and extent." *United States* v. *Alessi*, *supra*, 638 F.2d at 473. Again, it is not the government's burden to prove that Thomas knew all the conspirators or each of their activities.

Even if a variance existed between the conspiracy charged and the conspiracies proved at trial, we would reverse as to an appellant only upon a showing that he had suffered substantial prejudice. *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1247-48, 90 L.Ed. 1557, 1566-67 (1946); *Berger* v. *United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314, 1318 (1935). There is no such showing here. There was no charge here based on *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), which allows one member of a conspiracy to be convicted for substantive crimes if committed by another in furtherance

of the conspiracy. We have found no hearsay statements uttered by a member of one of the conspiracies that was used to the detriment of a member of another. *United States* v. *Miley*, 513 F.2d 1191, 1208 (2d Cir.), *cert. denied sub nom. Vavrigos* v. *United States*, 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 662 (1975). There was also no prejudicial "spillover effect." Evidence that each appellant conspired to distribute heroin was substantial. Moreover, although nineteen defendants were indicted, only four went to trial, and there were at most two conspiracies. Thus, the number of persons tried together was small enough to enable the jury to give individual consideration to each. *See, United States* v. *Alessi*, *supra*, 638 F.2d at 475 (ten defendants, conviction affirmed); *United States* v. *Ricco*, 549 F.2d 264, 271 (2d Cir.), *cert. denied sub nom. Indiviglia* v. *United States*, 431 U.S. 905, 97 S.Ct. 1697, 52 L.Ed. 389 (1977) (twelve indicted, three unindicted co-conspirators, five went to jury, two conspiracies, conviction affirmed).[17]

That the defendants were accorded such consideration appears from the verdicts: Carson was acquitted on one of the two substantive counts against her, and the jury acquitted Gayburnetta Galloway on the conspiracy count and was unable to reach a verdict on the substantive count against her. *United States* v. *Alessi*, *supra*, 638 F.2d at 475; *United States* v. *Toliver*, 541 F.2d 958, 963 (2d Cir. 1976). Finally, no "shocking or inflammatory" evidence was introduced against any of the defendants. *See, United States* v. *Alessi*, *supra*, 638 F.2d at 475; cf. *United*

[17] *Cf. Kotteakos* v. *United States*, 328 U.S. 750, 753, 66 S.Ct. 1239, 1242, 90 L.Ed.2d 1557, 1560 (1946) (thirty-two indicted, nineteen tried together, thirteen went to jury, conviction reversed); *United States* v. *Bertolotti*, 529 F.2d 149, 156 (2d Cir. 1975) (twenty-nine indicted, thirty-one unindicted co-conspirators, seventeen went to jury, at least four conspiracies, conviction reversed).

States v. *Bertolotti*, 529 F.2d 149, 158 (2d Cir. 1975). Rather, "the crimes of the various appellants were not markedly different," *United States* v. *Miley*, *supra*, 513 F.2d at 1209, and the evidence introduced at trial against all defendants consisted mainly of real and testimonial evidence pertaining to drug transactions. *See*, *United States* v. *Ricco*, *supra*, 549 F.2d at 271.

B. *Claims of Mont.*

Mont argues that the court below erroneously admitted a hearsay statement implicating him in the distribution of heroin. Finding this claim without merit, we affirm Mont's conviction on all counts.

During his testimony, Agent Baker recounted a conversation he had in Atlanta with an individual named "Sam." Baker met Sam at Guy Wilkins' suggestion and used the occasion to identify sources of heroin. Sam indicated that he did not deal in heroin but made two telephone calls in an unsuccessful attempt to locate a source. Sam then asked, "Why don't you go to Lam?"[18] Baker inquired, "Who is Lam? Is he the owner of the *Our Place Bar*?" Sam replied, "Yes, he is probably doing the largest amount of heroin in Manhattan." Sam said he would go to New York and, if Baker had difficulty meeting Lam, he, Sam, would introduce them. Mont contends that these statements were inadmissible because Sam's membership in the conspiracy was not independently established and because the statements were not within any exception to the rule against hearsay. *See*, Fed.R.Evid. 801(d)(2)(E); *United States* v. *Geaney*, *supra*, 417 F.2d at 1120. The government responds that

[18] "Lam," of course, is a nickname for Mont, whose initials are "L.A.M." *See* note 6 *supra*.

Mont failed to preserve this issue for appellate review and argues further that Sam's statements were admissible as statements of a co-conspirator, as verbal acts, and as an aid to the jury's understanding of background events leading to the agents' investigation of Mont. Finally, the government argues harmless error. We conclude that if it were error to admit these statements, it was harmless because (1) the jury already had twice heard the substance of Sam's remarks, and (2) there was substantial additional evidence of Mont's guilt.

There was earlier evidence that when Agent Baker purchased heroin from Guy Wilkins on July 18, 1980, Wilkins indicated that his source was the owner of the *Our Place Bar*[19] and that the owner would soon receive part of a two-hundred pound shipment of heroin.

Similarly, there was earlier testimony that on September 9, 1980, when Agents Baker and Coleman gave Guy Wilkins an ounce of quinine and Baker announced he wanted to trade quinine towards the cost of heroin, especially with "the *Our Place Bar* source of supply," Wilkins replied "that's possible," because that source was one of the largest dealers of heroin in Manhattan and would probably need the quinine. Baker asked whether that source had received part of the two-hundred pound shipment of heroin, and Wilkins answered that it had not.

In short, Sam's statements merely corroborated what Wilkins, a member of the conspiracy well acquainted with Mont, had already said. Since the statements of Wilkins were admitted as statements of a co-conspirator in furtherance of the conspiracy, it is unlikely that those of Sam were significant factors in the jury's decision. Our

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19 Guy Wilkins repeated this statement in an August 12, 1981 conversation with Agent Baker.

conclusion that the error, if any, was harmless is reinforced by the fact that the evidence of Mont's guilt is compelling, as noted above.[20]

C. *Claims of Carson.*

In addition to challenging the sufficiency of the evidence supporting her conviction on the conspiracy count, Carson argues that there is insufficient evidence to sustain her conviction on a substantive charge. She also claims error in the trial court's charge respecting the effect that a finding of guilt on a substantive count should have on the jury's consideration of the conspiracy count. Finding no merit in these claims, we affirm Carson's convictions.

1. *The Substantive Count.*

Carson contends that there is insufficient evidence to support her conviction on Count 15, which charged her with possession with intent to distribute, and with distribution of, heroin in a July 25, 1981 sale to Agents Baker, Johnson and Williams. The question for us is whether there was evidence from which the jury could have found, beyond a reasonable doubt, that Carson knowingly participated in the sale. We conclude that the evidence was sufficient and affirm her conviction on Count 15.

On July 21, Wilkins had agreed to act as an intermediary in a heroin sale between the agents and Fred Galloway. There was no mention of Carson, but four

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[20] Mont challenges the admission of statements implicating him in the conspiracy on the ground that they constitute inadmissible hearsay. However, there is sufficient evidence tying all appellants to the conspiracy to render such statements admissible as declarations of a co-conspirator in furtherance of the conspiracy. *See* Fed.R.Evid. 801(d)(2)(E) and *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970).

days later, on July 25, when Wilkins arrived at the *Flash Inn* to meet the agents as planned, he was accompanied by Carson, whom he introduced as his "partner." Acknowledging the relationship, Carson confirmed the details of the partnership with Wilkins and discussed the heroin business. The partners—Carson and Wilkins—then drove with Agent Williams to the *Close Encounters Discotheque*. Enroute, Carson engaged in a narcotics-related conversation from which there can be no doubt that she was fully aware that the agents' purpose in going to the discotheque was to buy heroin from Galloway and Wilkins. When they arrived at the discotheque, arrangements were made for Gayburnetta Galloway to go some place, pick up the heroin and return with it. During Gayburnetta's absence, a fight broke out among patrons. Fearful that the police would arrive, Carson remarked to Agent Johnson that Galloway, whom she had greeted earlier, was stupid for allowing a fight to go on when he was "taking care of business."

Fully aware that delivery of the heroin was imminent and that the police were likely to arrive on the scene momentarily to deal with the fight, Carson went outside with the agents and was later joined by Wilkins. When Gayburnetta arrived, Wilkins said, "the dope's here. Let's go inside," and the group, including Carson, reentered the discotheque. Gayburnetta brought the heroin to an office in the discotheque. After conversing with Galloway and receiving $42,000 cash from the agents, Wilkins retrieved a paper bag from the office and handed it to Agent Baker.

Agent Baker gave the bag to Agent Johnson, who left to perform a field test on its contents. The test indicated heroin, and Johnson returned to the discotheque. Having earlier assured the agents that she could supply heroin if

they wanted it, Carson gave Agent Johnson her telephone number upon his request. She then warned Agent Johnson that police were in the discotheque, and the agents left.

The jury could reasonably conclude from this evidence that Carson knowingly participated in the July 25 heroin transaction and assisted in its successful completion. In particular, her fear of police intervention, her warnings to Agent Johnson, and her participation in the outside watch for Gayburnetta, permit the inference that Carson acted as a lookout. As Wilkins' "partner," she had a clear interest in the success of the transaction. The jury was warranted in finding that her appearance with Wilkins at the *Flash Inn* on the morning of July 25 was not as an innocent companion but as a sophisticated partner in the planned sale. *Cf. United States* v. *Calabro, supra,* 449 F.2d at 890. Her presence enabled her to observe and size up the customers and assure them that they were dealing with an established and reliable source of supply with a view to promoting and successfully completing the pending, as well as future, heroin deals.[21] This conclusion is supported by Carson's later refusal to deal with the agents because they "asked too many questions" on the night of the sale. This evidence, considered in light of the circumstances, permitted the jury to conclude, beyond a reasonable doubt, that Carson knowingly assisted in the

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21 In a July 17, 1981 conversation with the agents, Wilkins indicated that, since Chaffin was out of favor with "the Italians," he, Wilkins, could offer two potential sources of supply: Galloway, Chaffin's former partner, or Carson. Baker stated that he preferred to deal with Galloway. Baker also asked whether Galloway's heroin would be of the same quality as Chaffin's. Wilkins replied that the heroin would come from the same source, "the Italians." Thus, the inference is reasonable that Carson was attempting to change the agents' preference for Galloway as a source of supply.

sale, participated in it as something she wished to bring about, had a stake in its success, and sought by her actions to make it succeed. It was therefore reasonable for the jury to conclude that she was an aider and abettor in the sale. 18 U.S.C. § 2; *United States* v. *Barton*, 647 F.2d 224, 239 n.12 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981); *United States* v. *Clemente*, 640 F.2d 1069, 1078-79 (2d Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 102, 70 L.Ed.2d 91 (1981); *United States* v. *Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States* v. *Pui KanLam*, 483 F.2d 1202, 1207-08 (2d Cir. 1973), *cert. denied*, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881 (1974).

2. *The Jury Charge.*

During its deliberations, the jury sent a note to the court, stating: "The jury requests to know whether a decision of guilt on a substantive count automatically denotes guilt on the count of conspiracy." Answering the note, Judge Brieant instructed: "The answer to your question, in two words, is 'absolutely not.'" Carson argues that "[a]lthough the trial judge charged the jury that conviction on Count I should not be 'automatic' if they found Carson had committed the acts charged against her in Count XV, as a practical matter, the jury's verdict finding Carson guilty on Count XV virtually automatically had to result in a guilty verdict as to Count I as well." (Br. at 23.) This argument is frivolous.

Although Judge Brieant did charge that a finding of guilt on a substantive charge could be considered by the jury in evaluating the conspiracy count, he repeatedly stressed that the elements of the crime were different, that each count had to be considered separately, and that each

element of the crime had to be proven beyond a reasonable doubt before a verdict of guilt could be rendered on any count. Moreover, the court instructed the jury to decide each count of the indictment separately as to each defendant who was named in the count.

In view of the foregoing, Carson's conviction on the conspiracy count is also affirmed.

D. *Claims of Kenneth Thomas.*

Challenging his conviction on the conspiracy count, Thomas raises four issues on appeal in addition to his claim that the evidence was insufficient. He argues that the district court erred in denying his motion for a severance, in refusing to instruct the jury that the charge on aiding and abetting was not applicable to the conspiracy count, and in erroneously admitting into evidence contraband found in his possession at the time of his arrest, along with the agents' testimony that Thomas had engaged on numerous occasions in what appeared to be drug transactions. We find these claims to be without merit and affirm Thomas' conviction on the conspiracy count.

1. *Severance.*

Thomas' claim that the district court erred in denying his motion for a severance is based on two arguments. First, he asserts that the disproportionate charges and proof against him, as compared to his co-defendants, caused substantial prejudice. Second, he contends that the jury convicted him on the basis of guilt by association because there was substantial proof that the heroin conspiracy was a family business in which his brother, How-

ard Thomas, was culpably involved.[22] Thus, in essence, Thomas argues that he was unfairly prejudiced by the introduction of evidence concerning his co-defendants, which spilled over into the jury's consideration of the case against him. We disagree.

In *United States* v. *Losada, supra,* we recently noted the "heavy burden of persuasion" that an appellant bears in urging reversal of a trial court's decision not to grant a severance. 674 F.2d at 171. "[T]he decision to grant or deny a severance pursuant to Rule 14 is within the broad discretion of the trial court and will not be overturned on appeal absent some showing that the defendant suffered substantial prejudice due to the joint trial." *Id.* (quoting *United States* v. *Weisman,* 624 F.2d 1118, 1129-30 (2d Cir.), *cert. denied,* 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980)). That the defendant would have had a better chance of acquittal at a separate trial does not constitute substantial prejudice. *United States* v. *Sotomayor,* 592 F.2d 1219, 1228 (2d Cir.), *cert. denied sub nom. Crespo* v. *United States,* 442 U.S. 919, 99 S.Ct. 2842, 61 L.Ed.2d 286 (1979); *United States* v. *Stirling,* 571 F.2d 708, 733 (2d Cir.), *cert. denied,* 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978). Moreover, in determining whether a trial court's decision was correct, "a reviewing court should consider the need for judicial economy and the extent to which the judge instructed the jury to consider the evidence separately with respect to

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22 In addition to the fact that numerous defendants were related, there was other evidence indicating that the conspiracy was a "family business." Thus, during a heroin sale to the agents on June 24, 1980, Anthony Pegues referred to the heroin business in which he and Guy Wilkins were involved as a "family thing." Similarly, on August 10, 1981, Kenneth Nunes quoted Agent Johnson a favorable price of $8,500 for heroin because their business was "family."

each defendant." *United States* v. *Losada, supra,* 674 F.2d at 171.

There is no question that Thomas played a less prominent role in the conspiracy than many of his co-defendants. However, differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials. *United States* v. *Aloi,* 511 F.2d 585, 598 (2d Cir.), *cert. denied,* 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975). Moreover, the fact that evidence may be admissible against one defendant but not another does not necessarily require a severance. *United States* v. *Losada, supra,* 674 F.2d at 171; *United States* v. *Lyles,* 593 F.2d 182, 190 (2d Cir.), *cert. denied,* 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979); *United States* v. *Aloi, supra,* 511 F.2d at 598. Here, the trial court instructed the jury on numerous occasions to accord each defendant separate consideration. *United States* v. *Losada, supra,* 674 F.2d at 171-72; *United States* v. *Weisman, supra,* 624 F.2d at 1130. The evidence against Thomas was simple enough for the jury to consider without significant spillover effect. *United States* v. *Losada, supra,* 674 F.2d at 171; *United States* v. *Barton, supra,* 647 F.2d at 241; *United States* v. *Weisman, supra,* 624 F.2d at 1130. That the jury did so appears from the verdicts, as noted above. *United States* v. *Weisman, supra,* 624 F.2d at 1130; *United States* v. *Barnes, supra,* 604 F.2d at 161. Thus, the disparity in the proof and charges did not unfairly prejudice Thomas.

Nor does it appear that the jury was unable to distinguish among family members in finding guilt or innocence. Gayburnetta Galloway was acquitted even though her father, who pled guilty prior to trial, testified to his criminal involvement. In any event, proof of Howard Thomas' heroin-related activities would have been admis-

sible against Thomas in a separate trial to establish the existence of the conspiracy. *See, United States* v. *Praetorius*, 622 F.2d 1054, 1063 (2d Cir. 1979), *cert. denied sub nom. Lebel* v. *United States*, 449 U.S. 880, 101 S.Ct. 162, 66 L.Ed.2d 76 (1980). Consequently, the joint trial did not result in substantial prejudice to Thomas.

2. *The Court's Instructions on Aiding and Abetting.*

The trial judge charged that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is punishable as a principal. This instruction was repeated in response to a note from the jury asking for clarification of the meaning of "intent" as stated in the indictment. Thomas argues that this charge on aiding and abetting was unfairly prejudicial because it permitted the jury to convict him as an aider and abettor while finding insufficient evidence of his knowing membership in the conspiracy. This claim is also without merit.

In its main charge, the court had consistently discussed the conspiracy and substantive counts separately, and clearly specified and defined each of the elements of the conspiracy charge, including knowing participation. Before defining "aiding and abetting," the court instructed at the outset that the concept could be considered in connection with the counts then under discussion, *i.e.*, the substantive counts. Previously, the court had cautioned that Thomas was charged only with conspiracy and not with any substantive crimes. The court construed the jury's note as a request for clarification of the meaning of "intent" as relating to the phrase "possession with intent to distribute," and concluded its response to the note as follows:

> A person possesses with intent to distribute if she aids or abets some other person in selling or possess-

ing with intent to distribute or distributing heroin, and does so knowingly and wilfully.

I instruct you that you may find intent from considering all of the evidence in the case. However, specific criminal intent must be proved beyond a reasonable doubt *before a person may be convicted of any of these substantive crimes* in this indictment with respect to possession or intent to distribute. (Emphasis added.)

Counsel for Thomas did not object to this charge. Nor did he request that the court distinguish between substantive crimes and the conspiracy charge at this point.

Objection came to the court's response to a later note from the jury requesting assistance regarding the liability of a defendant for acts committed by a co-conspirator. The court responded by instructing that:

In deciding the substantive count you decide whether the person whose case you are then considering in the substantive count knowingly and wilfully either committed all the elements or knowingly and wilfully aided and abetted someone else to do the crime. An aider and abettor is accountable for the criminal acts of the principal. That I did tell you. But a member of the conspiracy is not on the theory of this case accountable for a substantive crime committed by a member of the conspiracy, by another member, in furtherance of it. (Emphasis added.)

Counsel for Thomas then requested the court to instruct that the charge on aiding and abetting was not applicable to the conspiracy count, and the court refused.

The court's charges on aiding and abetting, whether viewed separately or, as they should be in the context of

the entire charge, *United States* v. *Scacchetti*, 668 F.2d 643, 649 (2d Cir. 1982), were correct. In short, there is little likelihood that the jury was misled into believing that one who was not shown to be a knowing member of the conspiracy could be convicted as a member on a theory of aiding and abetting. The jury's lack of confusion is evidenced by its acquittal of Galloway on the conspiracy count while failing to reach a verdict on the substantive count. *See, United States* v. *Sanzo*, 673 F.2d 64, 69 (2d Cir. 1982).

3. *Admissibility of the Seized Contraband.*

When Thomas was searched incident to his arrest, two vials containing traces of heroin and cocaine and several cellophane envelopes were found in his possession, and these items were received in evidence at trial.[23] Thomas argues that the admission of the contraband was so prejudicial that it should have been excluded because it was proof of similar uncharged crimes and that the period of one week between the filing of the indictment (October 13, 1981) and his arrest (October 20, 1981) was too lengthy to permit an inference of his participation in the conspiracy.

As we have often observed, the trial judge has broad discretion in ruling on the admissibility of relevant evidence: "the preferable rule is to uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally." *United States* v. *Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978). There has been no showing that the trial judge was either arbitrary or irra-

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23 After Judge Brieant ruled that the heroin was admissible, counsel for Thomas insisted that the cocaine be admitted as well.

tional in balancing the probative value of this evidence against its prejudicial effect. Quite the contrary. Even if we assume that the contraband proved similar uncharged crimes, glassine envelopes and vials containing narcotics are tools of the drug trade, and evidence of possession of them at a closely related time is relevant to the conspiracy charge and not a mere showing of bad character, even if they relate to transactions outside the scope of the conspiracy. *See, e.g., United States* v. *Barnes, supra,* 604 F.2d at 166-67; *United States* v. *Viserto,* 596 F.2d 531, 537-38 (2d Cir.), *cert. denied,* 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979).

Standing alone, the one-week lapse of time between the filing of the indictment and seizure of the contraband was not so lengthy as to render the evidence too remote from the crime to preclude an inference that Thomas participated in the conspiracy, even if Thomas' source, his brother Howard, was arrested on October 4, 1981, sixteen days before the seizure. *See, United States* v. *Taylor, supra,* 562 F.2d at 1358; *United States* v. *Bermudez,* 526 F.2d 89, 95-96 (2d Cir. 1975), *cert. denied,* 425 U.S. 970, 96 S.Ct. 2166, 48 L.Ed.2d 793 (1976); *United States* v. *Tramunti, supra,* 513 F.2d at 1115-16; *United States* v. *Mallah,* 503 F.2d 971, 981 (2d Cir. 1974), *cert. denied,* 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975).

4. *Testimony Regarding Street-Corner Transactions.*

Thomas argues that the district court erred in allowing Agents Johnson and West to testify concerning their observations of Thomas engaging in what appeared to them to be narcotics transactions. First, he claims that the testimony did not relate sufficiently to the conspiracy charged and, thus, constituted inadmissible proof of other crimes under Fed.R.Evid. 404(b). In addition,

Thomas contends that the agents should not have been permitted to testify as to their opinions regarding the nature of Thomas' activities. We find no error in the trial judge's ruling on these evidentiary points.

Johnson and West made their observations during the course of their undercover activities. Each agent testified that he observed Thomas covertly passing something to people on the street in exchange for cash. During Johnson's testimony, counsel for Thomas objected to Johnson's conclusion that these exchanges appeared to him to be drug transactions. Counsel did not object or contend that Johnson's description consitituted proof of other crimes. Nor did he move to strike it on that basis. Moreover, counsel did not object at all to West's testimony concerning his observations and conclusions.

Having failed to object to this testimony on the ground now urged, Thomas waived an objection that the testimony constituted inadmissible evidence of other crimes. *See, United States* v. *Hutcher,* 622 F.2d 1083, 1087 (2d Cir.), *cert. denied,* 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980). Moreover, as we have said earlier, evidence of Thomas' apparent drug-related activities was relevant to the conspiracy charge, even if it proved other crimes. *See, United States* v. *Barnes, supra,* 604 F.2d at 166; *United States* v. *Viserto, supra,* 596 F.2d at 536, 537-38. Thus, the trial court did not abuse its discretion in failing to strike the testimony. The admissibility of this evidence was not dependent on direct proof that the drugs sold by Thomas were of conspiracy origin. As we noted in *Viserto, supra,* "[n]arcotics is a business, though an illegitimate one, and evidence that the defendants were in the business at a closely related time is relevant, and is not a mere showing of bad character." 596 F.2d at 537-38. Thomas also contends that the furtive exchanges may

have related to other illicit activity, but this effects the weight of the proof and not its admissibility.

Nor was it error for the court to permit the agents to testify that Thomas' furtive activity appeared to them to be sales of narcotics. Under Fed.R.Evid. 702, expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." The subject of the expert testimony here, *i.e.*, the clandestine manner in which drugs are bought and sold, is unlikely to be within the knowledge of the average layman. *United States* v. *Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979). The conclusions of the agents were based on years of experience investigating narcotics offenses.[34] This provided them with specialized knowledge, not possessed by the jury, of the manner in which drug transactions are conducted. Thus, under Rule 702, it was proper for the agents to recount their observations and render an opinion based on them. *See, e.g., United States* v. *Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir. 1972), *cert. denied sub nom. Gernie* v. *United States*, 410 U.S. 927, 93 S.Ct. 1360, 35 L.Ed.2d 588 (1973) (expert opinion of DEA agent that coded conversations involved narcotics transaction admissible); *see also, United States* v. *Martino*, 664 F.2d 860, 864 n.3 (2d Cir. 1981); *United States* v. *Cirillo*, 499 F.2d 872, 881 (2d Cir.), *cert. denied*, 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974). "[T]he trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." 3 J. Weinstein &

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[34] Agents Johnson and West together served for twenty years as officers of the narcotics branch of the Washington, D.C. police department.

M. Berger, Weinstein's Evidence ¶¶ 702[02]; *McGregor-Doniger, Inc.* v. *Drizzle Inc.*, 599 F.2d 1126, 1138 n.7 (2d Cir. 1979); *Fernandez* v. *Chios Shipping Co.*, 542 F.2d 145, 153 (2d Cir. 1976). Again, there is no indication that the trial court's ruling constituted an abuse of discretion.

CONCLUSION

Finding the judgments of conviction entered below to be supported by substantial evidence, and finding no reversible error, we affirm the convictions of all appellants on all counts.

No. 82-6696

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,

UNITED STATES OF AMERICA,

Petitioner,

-v.-

KENNETH THOMAS,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Kenneth Thomas respectfully seeks leave to proceed here in forma pauperis, without payment of filing fees and costs.

Counsel certifies that, in proceedings before the lower court in this case, petitioner was represented by counsel assigned pursuant to the Criminal Justice Act.

New York, New York
May 3, 1983

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